TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~632.~~ 370-111

JAMES S. CLARK AND EDWARD FULTON, PARTNERS UNDER THE FIRM-NAME OF J. S. CLARK & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED APRIL 18, 1876.

April 1879 Arg. Mr Swayne

96 U.S. 449
Oct 1878

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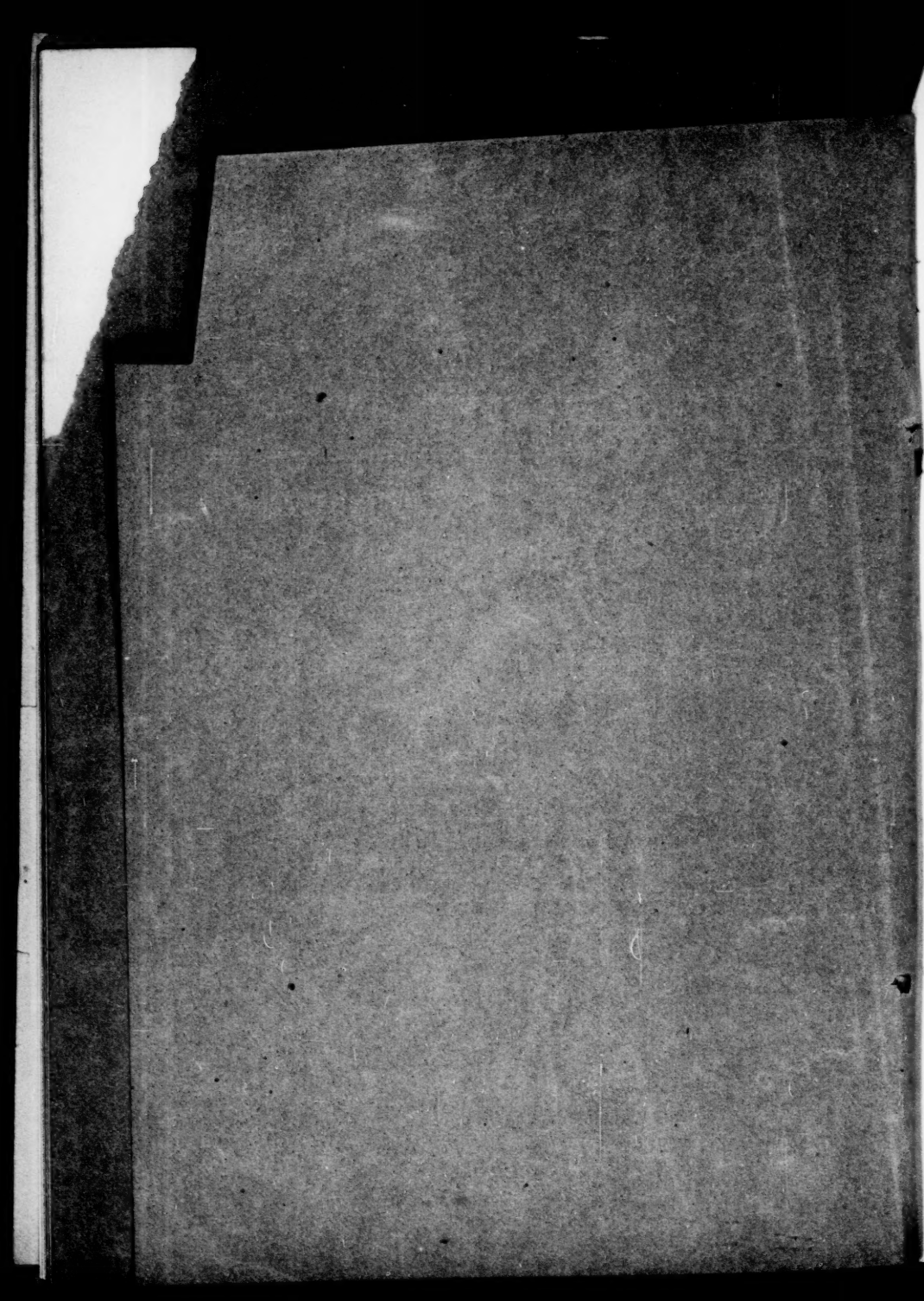
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INDEX.

	Original.	Print.
Original petition filed March 27, 1872	1	1
Traverse	5	2
Plea of limitation under act of 12th March, 1863	6	3
Plea of limitation of six years	7	3
Amended petition filed January 27, 1873	8	3
Demurrer to defendants' plea of limitation under act of 12th March, 1863.	10	4
Replication to defendants' plea of limitation of six years	11	5
Amended petition filed December 7, 1874	12	5
Final judgment by the court	13	5
Application for allowance of appeal	14	6
Order allowing same	14	6
Findings of fact by the court and conclusion of law	15	6
Certificate	18	7

1 *Petition.—Filed March 27, 1872.*

In the United States Court of Claims, December term, 1872.

JAMES S. CLARK, EDWARD FULTON, AND Joseph C. Palmer, *vs.* THE UNITED STATES. } No. 6429.

To the honorable the Chief-Justice and judges of the United States Court of Claims:

Your petitioners, James S. Clark and Edward Fulton, residents of the city of New Orleans, in the State of Louisiana, and Joseph C. Palmer, a resident of the city of San Francisco, in the State of California, respectfully represents:

1st. That in the year 1865 they were commercial partners, during business under the firm-name of J. S. Clark & Co., and that each of them was then a resident of the State of Louisiana, where they continued to reside until the close of the late rebellion.

2d. That on or about the twenty-first day of July, 1865, your petitioners, as such partners, were the exclusive owners, in their own right, of about nine hundred bales of cotton, then being at Mobile, in
2 the State of Alabama, the average weight of which cotton was five hundred pounds per bale; that they are positive the number of bales of said cotton exceeded eight hundred, and believe that there was nine hundred bales of said cotton; and that the total weight thereof was four hundred and fifty thousand pounds.

3d. That some time in the months of July and August, A. D. 1865, (but the exact date your petitioners are not now able to state,) the said cotton, the property of your petitioners, was seized by T. C. A. Dexter, known as and called a Treasury agent, and acting in that behalf for and on account of the United States; and your petitioners further state that the said cotton was, after the seizure thereof by the said Treasury agent, forwarded by him to some one of the United States not declared in rebellion by any proclamation of the President of the United States, and petitioners are informed and believe that said cotton was forwarded to the State and city of New York, and consigned to one Simeon Draper, at that place, and that he there sold the same for and on account of the United States, and the proceeds thereof, amounting, as your petitioners are informed and believe, to two hundred and seventy thousand dollars, placed in the Treasury of the United States.

4th. That the said cotton was not, nor was any part thereof, captured, nor was the same or any part thereof abandoned by your petitioners, but that it was in their quiet and undisputed possession; and that the said cotton was not liable, under the laws of war, or of the United States, to be captured, seized, or confiscated by reason of any offense committed by petitioners, or either of them, either against the laws of war or against the United States, or by reason of any use made at any time by your petitioners, or either of them, of the said cotton, but that the same was wholly free from any such liability; and your
3 petitioners further aver that the said cotton was not, nor was any part thereof, ever condemned as forfeited to the United States by any judicial proceedings ever instituted for that purpose, either against the said cotton or against your petitioners, or either of them, as owners thereof.

5th. That the seizure and sale of said cotton by the Treasury agent

of the United States was unauthorized and unlawful; but your petitioners hereby ratify and confirm the acts of the agents of the United States in the sale of said cotton, and claim the proceeds of the sale thereof from the United States in this suit.

6th. That neither one of your petitioners ever aided, assisted, or gave encouragement to rebellion against the Government of the United States.

7th. That your petitioners, by reason of the premises, claim from the United States the said sum of two hundred and seventy thousand dollars.

CASE & ROUSE,
JOHN J. WEED,
Solicitors for Claimants.

Address of claimants: James S. Clark, New Orleans, La.; Edward Fulton, New Orleans, La.; Joseph C. Palmer, San Francisco, Cal.

Address of counsel: Case & Rouse, New Orleans, La.; J. J. Weed, Washington, D. C.

4 STATE OF LOUISIANA,
City of New Orleans, ss:

James S. Clark, being duly sworn, on his oath states that he is one of the claimants named in the foregoing petition; that no assignment or transfer of the claim stated in the foregoing petition, or any part thereof, or any interest therein, has been made; and that said petitioners are entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that the facts stated in said petition are true to the best of his knowledge and belief.

JAMES S. CLARK.

Subscribed and sworn before me this 23d March, A. D. 1872.
[L. S.] GEORGE G. BLODGET,
United States Commissioner District of Louisiana.

5 In the Court of Claims of the United States, December term, A. D. 1871.

JAMES S. CLARK ET AL. *vs.* THE UNITED STATES. } No. 6429.

And now comes the Attorney-General, on behalf of the United States, and makes answer to the petition of the claimant herein, and, not confessing the same or any part thereof, denies each and every the allegations therein contained, and calls for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the United States are indebted to the said claimant in the sum of two hundred and seventy thousand dollars, says that they are not indebted to the said claimant in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimant' have at all times borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, denies the said allegation.

WM. McMICHAEL,
Assistant Attorney-General.

Filed June 11, 1872.

6 In the Court of Claims, Dec. term, 1871.

JAMES S. CLARK ET AL. *vs.* THE UNITED STATES. } No. 6429.

Plea.

And for a further plea to the said petition the said defendants say that the said claimants ought not to have or maintain their aforesaid action against the said defendants, because they say that the said claimants did not "within two years after the suppression of the late rebellion prefer their claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

WILLIAM McMICHAEL,
Asst. Att'y-General.

Filed October 21, 1872.

7 In the Court of Claims, Dec. term, 1871.

JAMES S. CLARK ET AL. *vs.* THE UNITED STATES. } No. 6429.

Plea.

Now come the defendants, by their Attorney-General, and say that the claimants herein should not further have or maintain their suit against the defendants, for the reason that the petition of the claimants was not filed in this cause nor transmitted to it within six years after the claim therein set forth first accrued.

Wherefore the defendants ask judgment, &c.

WILLIAM McMICHAEL,
Asst. Att'y-General.

Filed October 21, 1872.

8 *Amended petition.—Filed January* 27, 1873.—*A. H.*

In the United States Court of Claims, December term, A. D. 1872.

JAMES S. CLARK, EDWARD FULTON, AND Joseph C. Palmer *vs.* THE UNITED STAES. } No. 6429.

The claimants, by leave of the court, for that purpose first had and obtained, for amendment to their original petition, on file herein, state as follows:

1st. That your petitioners James S. Clark and Edward Fulton composed the firm of "J. S. Clark & Co." at the time the cotton mentioned and described in the original petition herein was purchased by your petitioners, and that the petitioner Joseph C. Palmer was jointly interested therein, and owned one-third part thereof. And your petitioners

aver that the said Joseph C. Palmer was not, at any time, a member of the firm of "J. S. Clark & Co.," and was only interested in the said cotton as a joint owner thereof, and not otherwise.

2d. Your petitioners further state that on or about the 20th day of April, A. D. 1866, upon an adjustment of the business and losses between your petitioners in relation to the purchase of the cotton mentioned in the original petition filed herein, the said Joseph C. Palmer, for a
9 valuable consideration, transferred to your petitioners James S. Clark and Edward Fulton, who were then partners under the name and style of "J. S. Clark & Co.," all his right and interest in and to said cotton or to the proceeds thereof, and the said Joseph C. Palmer, from the date of the said transfer, ceased to have any interest in the said cotton or in the proceeds thereof. And the said Joseph C. Palmer has no interest, direct or indirect, in the result of this suit.

3d. Your petitioners further state that this suit is prosecuted for the sole use and benefit of your petitioners James S. Clark and Edward Fulton, who are partners as "J. S. Clark & Co.," and your petitioners pray the court that this suit be entered upon the records of this court, and hereafter prosecuted in the names of "James S. Clark, Edward Fulton, and Joseph C. Palmer," for the use of "J. S. Clark & Co."

JOHN J. WEED,
JOHN D. ROUSE,
Solicitors for Claimant.

CITY OF LOUISIANA,
Parish of Orleans, ss:

James S. Clark, being duly sworn, on his oath states that the matters and things stated and set forth in the foregoing amended petition are true in substance and in fact.

JAS. S. CLARK.

Subscribed and swo'n to before me this 17th day of January, 1873.
[SEAL.] R. H. SHANNON,
U. S. Commissioner.

10 In the United States Court of Claims, December term, A. D. 1872.

JAMES S. CLARK ET ALS., FOR THE USE OF James S. Clark and Edward Fulton,
vs.
THE UNITED STATES.
No. 6429.

Demurrer to defendant's second plea.

And the said claimants, as to the said plea of the said defendant, by it secondly above pleaded, say that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said claimants, from having or maintaining their aforesaid action thereof against the said defendant, and that they, the said claimants, are not bound by law to answer the same. And this the said claimants are ready to verify; wherefore they pray judgment, &c.

JOHN J. WEED,
Attorney for Claimants.

Filed Oct. 29, 1873.

11 In the United States Court of Claims, December term, A. D. 1872.

JAMES S. CLARK ET ALS., FOR THE USE OF James S. Clark and Edward Fulton,
vs.
THE UNITED STATES. } No. 6429.

Replication to the defendant's third plea.

And the said claimants, as to the said plea of the said defendant, by it thirdly above pleaded, say that the said claimants, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining their aforesaid action thereof against the said defendant, because they say that the said petition, setting forth the claim and cause of action of the said claimants against the said defendant, was filed in this court within six years after the cause of action therein stated and set forth first accrued against the United States and became cognizable by this court. And this the said claimants pray may be inquired of by the court.

JOHN J. WEED,
Attorney for Claimants.

Filed Oct. 29, 1873.

12 In the United States Court of Claims.

JAMES S. CLARK AND EDWARD FULTON, partners under the name and style of J. S. Clark & Co.,
vs.
THE UNITED STATES. } No. 6429.

Amended petition.—Petition filed Dec. 7, 1874.—A. H.

The claimants, by leave of the court for that purpose first had and obtained, file their amended petition herein, as follows:

That the name of Joseph C. Palmer is hereby stricken from the original and amended petitions wherever it appears therein, so that the said cause shall stand upon the record and be prosecuted only in the names of James S. Clark and Edward Fulton, partners under the name and style of J. S. Clark & Co.; and the said claimants pray judgment in the name of the said J. S. Clark & Co., for whose sole use and benefit the above-entitled suit is prosecuted.

JOHN J. WEED,
Solicitor for Claimants.

13 In the Court of Claims.

JAMES S. CLARK AND EDWARD FULTON, partners under the name and style of J. S. Clark & Company,
vs.
THE UNITED STATES. } 6429.

At a Court of Claims, held at the Capitol, in the city of Washington, the 13th day of March, A. D. 1876, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the defendants, and do order, adjudge, and decree that the said claimants' petition be dismissed.

By the court.

14 In the Court of Claims, December term, 1875.

JAMES S. CLARK AND EDWARD FULTON, partners under the firm name and style of J. S. Clark and Company,
vs.
THE UNITED STATES. } No. 6429.

The claimants, by John J. Weed, their attorney, come and pray an appeal from the judgment rendered herein, in the above-entitled cause, to the Supreme Court of the United States.

JOHN J. WEED,
Atty. for Claimants.

Filed April 3, 1876.

Ordered, That the appeal be allowed as prayed for.

By the court.

15 In the Court of Claims.

JAMES S. CLARK & COMPANY, JOSEPH C. Palmer,
vs.
THE UNITED STATES. } No. 6429.

FINDINGS OF FACT.

The petitioners claim the net proceeds of 900 bales of cotton, and the court finds the facts to be:

That in July and August, 1865, the petitioners James S. Clark and Edward Fulton were merchants and copartners, doing business at New Orleans under the firm and style of J. S. Clark and Company, and Joseph C. Palmer was a merchant at Mobile.

That in said July and August the petitioners were the owners jointly of nine hundred bales of cotton, which arrived at Mobile in the
16 last part of said July or the first part of said August, consigned by them to T. C. A. Dexter, supervising special agent of the Treasury Department for the Department of Alabama.

At the times above stated the Government had charge of the railroads, and the cotton was consigned to Mr. Dexter to facilitate its arrival at Mobile; and on its arrival there it was claimed of him by the petitioners.

In August, 1865, Mr. Dexter, having received orders from the Treasury Department to ship all cotton received by him, shipped the said 900 bales to New York, where it arrived, and was sold by the United States, and the net proceeds thereof, amounting to the sum of $127,350.00, were paid into the Treasury.

The said Clark and Fulton resided in New Orleans, and said Palmer in Mobile, during the whole rebellion, and this petition was filed March 27, 1872.

17 And the court being equally divided in opinion upon the questions of law arising on the facts found, it is ordered that the petition be dismissed.

By the court.

18 In the Court of Claims.

JAMES S. FULTON AND EDWARD FULTON, partners under the firm-name and style of J. S. Clark & Company,
vs.
THE UNITED STATES.
No. 6429.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause and the final judgment of the court thereon; of the application of the solicitor for claimants for the allowance of an appeal, as filed in the clerk's office April 3, 1876, and of the order of the Court of Claims allowing the same; of the findings of fact by the court and the conclusion of law thereon, on which the court founded its judgment.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 17th day of April, A. D. 1876.

[SEAL.] JOHN RANDOLPH,
Assistant Clerk Court of Claims.

(Indorsement on cover:) No. 632. James S. Clark and Edward Fulton, partners as J. S. Clark & Co., appellants, *vs.* The United States. Court of Claims. Filed 18th April, 1876.

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United States Supreme Court.

OCTOBER TERM, A. D. 1878.

JAMES S. CLARK
and
EDWARD FULTON, Partners,
as J. S Clark & Co.,
Appellants,

vs.

THE UNITED STATES.

No. 111.

BRIEF AND ARGUMENT

For Appellants.

JOHN J. WEED,
Attorney for Appellants.

WASHINGTON, D. C.
R. O. POLKINHORN, PRINTER,
1878.

United States Supreme Court.

OCTOBER TERM, A. D, 1878.

NO. 111.

JAMES S. CLARK AND EDWARD FULTON,
PARTNERS UNDER THE FIRM NAME OF
J. S. CLARK & COMPANY, *Appellants*,
vs.
THE UNITED STATES.

BRIEF AND ARGUMENT FOR APPELLANTS.

I.

Statement of the Case.

The appellants, on the 27th day of March, A. D. 1872, filed their petition in the Court of Claims, to recover from the United States the sum of two hundred and seventy thousand dollars, which they alleged the United States had received into its treasury as the proceeds resulting from the seizure and sale of nine hundred bales of cotton, of which the appellants were the owners, and which they had in their possession in the month of July, A. D. 1865.

The petition of the appellants in the Court of Claims, contained the following material averments:

1st. That some time in the months of July and August, A. D. 1865. (but the exact date your petitioners are not now able to state), the said cotton, the property of your petitioners, was seized by T. C. A. Dexter, known as and called a Treasury agent, and acting in that behalf for and on account of the United States; and your petitioners further state that the said cotton was, after the seizure thereof by the said Treasury agent, forwarded by him to some one of the United States, not declared in rebellion by any proclamation of the President of the United States; and your petitioners are informed and believe that said cotton was forwarded to the State and City of New York, and consigned to one Simeon Draper, at that place, and that he there sold the same for and on account of the United States, and the proceeds thereof amounting, as your petitioners are informed and believe, to two hundred and seventy thousand dollars, placed in the Treasury of the United States.

2nd. That the said cotton was not, nor was any part thereof, captured, nor was the same or any part thereof abandoned by your petitioners, but that it was in their quiet and undisputed possession, and that the said cotton was not liable, under the laws of war, or of the United States, to be captured, seized, or confiscated by reason of any offense committed by your petitioners, or either of them, either against the laws of war, or against the United States; or by reason of any use made at any time by your petitioners, or either of them, of the said cotton, but that the same was wholly free from any such liabil ity; and your petitioners further aver that the said cotton was not, nor was any part thereof, ever condemned as forfeited to the United States by any judicial proceedings ever instituted for that purpose, either against the said cotton or against your petitioners, or either of them, as the owners thereof.

3rd. That the seizure and sale of said cotton by the Treasury agent of the United States, was unauthorized and unlawful; but your petitioners hereby ratify and confirm the acts of the agents of the United States, in the

sale of said cotton, and claim the proceeeds of the sale thereof from the United States in this suit.

4th. That neither one of your petitioners ever aided, assisted, or gave encouragement to rebellion against the Government of the United States.

Record pp. 1, 2.

The Defense and issues thereon.

To this petition, the United States filed the following pleas:

1st. The general issue.

2d. That the claimants did not prefer their claim to the proceeds of the cotton claimed in their petition "*within two years after the suppression of the rebellion*," as required by the third section of the act of Congress, approved March 12th, 1863.

3d. That the petition of the claimants was not filed in this court, nor transmitted to it, *within six years after the claim therein set forth first accrued.*

Record, pp. 2, 3.

The appellants, to the *second* of these pleas, filed a *general demurrer;* and to the *third* plea the appellants replied:

"That the said petition, setting forth the claim and cause of action of the said claimants against the said defendants, *was filed in this court within six years after the cause of action therein stated and set forth first accrued against the United States*, AND BECAME COGNIZABLE BY THIS COURT."

Record, pp 4, 5.

II.

Judgment.

The Court of Claims, on the 13th day of March, A. D. 1876, found in favor of the defendants, and ordered, adjudged, and decreed that the claimants petition be dismissed; and from that judgment the appellants, on the 3d day of April, A. D. 1876, prayed the allowance of an appeal to this court.

Record, p. 6.

III.

Findings of Fact.

The Court of Claims, upon the trial of the said cause, found and certified to this court the following findings of fact:

"The petitioners claim the net proceeds of 900 bales of cotton, and the court find the facts to be—

"That in July and August, 1865, the petitioners, James S. Clark and Edward Fulton, were merchants and copartners, doing business at New Orleans under the firm and style of J. S. Clark & Co., and Joseph C. Palmer was a merchant at Mobile.

"That in the said July and August the petitioners were the owners, jointly, of nine hundred bales of cotton, which arrived at Mobile in the last part of said July or the first part of said August, consigned by them to T. C. A. Dexter, supervising and special agent of the Treasury Department for the department of Alabama. At the time above stated the Government had charge of the railroads, and the cotton was *consigned* to Mr. Dexter to facilitate its arrival at Mobile; and on its arrival there it was claimed of him by the petitioners. In August, 1865, Mr. Dexter having received orders from the Treasury Department to ship all cotton received by him, shipped the said 900 bales to New York, where it arrived and was sold by

the United States, and the net proceeds thereof, amounting to the sum of $127.350, were paid into the Treasury.

"The said Clark and Fulton resided in New Orleans, and said Palmer in Mobile, during the whole rebellion, and this petition was filed March 27, 1872."

Record, p. 6.

Upon these facts the Court of Claims was equally divided as to the right of the appellants to recover, and therefore no opinion was delivered.

Record, p. 7.

IV.

Assignment of Errors.

That the Court of Claims erred in rendering judgment for the defendants, and in directing the appellants' petition to be dismissed.

V.

Argument.

The question which these facts present is, whether the appellants may maintain their action in this court against the United States upon an *implied contract*.

The act establishing this court provides that it shall "hear and determine all claims founded on any law of Congress, or upon any regulation of an executive department, *or upon any contract, express or implied*, with the Government of the United States."

10 Stat. at Large, 612.

By the provisions of this act, the Government waives its sovereignty, and submits to be sued in one of its courts, established for that purpose, upon any contract, express or implied. Whatever state of facts, therefore,

would, as between individuals, sustain an action of *assumpsit*, will sustain an action in the Court of Claims against the Government. Therefore, if it can be shown that the appellants could have maintained an action *ex contractu* against an individual whose agents had dealt with this cotton, as the officers of the Government have done, and who, as principal, had received in cash from his agents under similar circumstances the avails of a sale of such cotton, as the Government has done, then this action can be maintained, unless the claim is barred by the statute of limitations. We shall endeavor to show that such action could be maintained against an individual, and that this claim is not barred by any statute of limitations.

A.—The seizure of the appellants' cotton in the manner stated by the Court of Claims in the findings of fact, was unauthorized and unlawful. It was a wrong or *tort* for which the Treasury agent might have been sued in an action *ex delicto*, and to which action he could have made no defense.

The correctness of this proposition is to be determined by considering the seizure of the appellants' cotton: First, as authorized by the legislation of Congress; and, Second, as justifiable as an act of war, done for the purpose of weakening the enemy.

First. THE SEIZURE WAS NOT AUTHORIZED EITHER BY THE ACTS OF CONGRESS, OR BY THE REGULATIONS PRESCRIBED BY THE SECRETARY OF THE TREASURY TO CARRY INTO EFFECT THE PROVISIONS OF SUCH ACTS OF CONGRESS.

a. The appellants' cotton was not liable to seizure for any violation of the *non-intercourse* act of July 13th, 1861. 12 Stats. at Large, Sect. 5, p. 257.

There was at the time the appellants' cotton was seized, no restriction upon trade (except in articles contraband of war) in the insurrectionary States east of the Mississippi River, because the President, by his proclamation of June 13, 1865, had declared—

"That all restrictions upon internal, domestic, and coastwise intercourse and trade, and upon the removal of products of States heretofore declared in insurrection, (reserving and excepting only those relating to contraband of war, as hereinafter recited, and also those which relate to the reservation of the rights of the United States to property purchased in the territory of an enemy,) heretofore imposed in the territory of the United States east of the Mississippi River, are annulled, and I do hereby direct that they be forthwith removed."

13 Stat. at Large, 763.

b. It was not liable to seizure by reason of any use made thereof, with the consent of the appellants, as provided in the act of Congress, approved August 6th, 1861.

12 Stats. at Large, 319.

c. It was not liable to seizure under the provisions of the confiscation act, approved July 17th, 1862, because the appellants gave neither aid nor comfort to the late rebellion.

12 Stats. at Large, 590.

d. Nor was the Treasury agent authorized to receive the appellants' cotton under the provisions of the act of Congress, approved March 12th, 1863, known as the "Abandoned or Captured Property Act."

12 Stats. at Large, 820.

It will not be urged that the seizure of the cotton belonging to the appellants was justified under any or either of these acts except the last; and it will not be difficult to demonstrate that its seizure was unlawful by the terms of the last mentioned of these acts.

The *first* section of that act provides—

"That it shall be lawful for the Secretary of the Treasury, from and after the passage of this act, as he shall from time to time see fit to appoint a special agent or agents to receive and collect *all abandoned or captured property* in any State or Territory, or any portion of any State or Territory of the United States, designated as in insurrection against the lawful government of the United States, by proclamation of the President of July 1st, 1862."

12 Stats. at Large, 820.

The *third* section of this act provided that these special agents thus appointed, should give bond, and keep a book or books of account, showing from whom such property was received, the cost of transportation and the proceeds of the sale thereof.

12 Stats. at Large, 820.

The Secretary of the Treasury, in his circular letter to the special agents appointed by him under the provisions of the above act, dated July 3, 1863, defined "Abandoned and Captured Property," as follows:

"ABANDONED PROPERTY is of two descriptions: *First*, that which has been deserted by the owners; and *second*, that which has been voluntarily abandoned by them to the *civil* or military authorities of the United States. CAPTURED PROPERTY is understood to be that which has been seized or taken from hostile possession by the military or naval forces of the United States."

This definition of "Abandoned and Captured Property" is found on page 58 of the book, entitled:

"ACTS OF CONGRESS AND RULES AND REGULATIONS PRESCRIBED BY THE SECRETARY OF THE TREASURY, IN PURSUANCE THERETO WITH THE APPROVAL OF THE PRESIDENT, CONCERNING COMMERCIAL INTERCOURSE WITH AND IN STATES AND PARTS OF STATES DECLARED IN INSURRECTION, CAPTURED,

ABANDONED, AND CONFISCABLE PROPERTY, THE CARE OF FREEDMEN, AND THE PURCHASE OF PRODUCTS OF INSURRECTIONARY STATES ON GOVERNMENT ACCOUNT. REPRINT. WASHINGTON: GOVERNMENT PRINTING OFFICE, 1872."

Again, at page 82 of this volume of regulations, in No. IV. of a series of regulations issued on the 11th day of September, 1863, abandoned or captured property is defined in the same terms; and Congress, in the *second* section of the act of July 2d, 1864, defines *abandoned* property as follows:

"*Property, real or personal, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, and engaged either in arms or otherwise, in aiding or encouraging the rebellion.*"

13 Stats. at Large, pp. 375, 376.

Treasury agents, therefore, appointed under the authority conferred by the act of March 12th, 1863, had no concern with, nor any right to "*receive*" any property for the United States, unless it came within the definition of "Abandoned or Captured Property."

There is no pretence that the cotton in question was ever within either of these categories. And to show that the treasury agent acted "*in virtue or under color of*" this act, it must be shown that, being under some mistake of *fact* as to the former condition of the property, he acted in good faith, that is, with the honest belief, founded upon such mistake of fact, that the property was subject to seizure under the act. The burthen of showing the existence of this mistake of fact rests upon the Government. All persons are supposed to know the law. And officers appointed to administer a particular act are especially supposed to know the law under which they are acting; and more particularly where, as in this case, the statute and the regulations prescribed by the Secretary of the Treasury, for its administration, are free from ambiguity.

In a technical sense there can be no such thing as a capture on land; but waiving this, and construing the phrase "captured property" in its most popular sense, it must be confined to property which has been seized by force by the military or naval authorities, or property which has fallen into the hands of the Government in direct consequence of the operations of war. There is no pretence that Dexter, the treasury agent, was mistaken as to any *fact* which induced him to believe that this property fell within either of these categories, or that he was authorized to receive it for the United States under the act of March 12, 1863. He knew that this cotton had been consigned to him by the owners for their own benefit. It is not pretended that he supposed that the cotton had been seized or obtained in any act of war, or that the appellants had ever aided the rebellion so as to render the property *abandoned* within the definition of that term as declared in the act of July 2, 1864, or the instructions of the Secretary of the Treasury, from which alone his authority to receive "abandoned or captured property" was derived. Nor had the treasury agent any reason to suppose that the appellants, by consigning their cotton to him, intended thereby to *donate* the same to the United States, or to *abandon* it to the United States, within the meaning of that term, as defined in the Treasury Regulations of July 3, 1863, and September 11, 1863; becaue the Court of Claims find that the cotton had been consigned to the treasury agent by the appellants "*to facilitate its arrival at Mobile; and on its arrival there, it was claimed of him by the appellants.*"

But, again, whatever authority the treasury agent possessed to receive "abandoned or captured property" under the instructions or regulations of the Secretary of the Treasury, issued for the purpose of giving effect to the act of March 12, 1863, was terminated on the 30th day of June, 1865, by a series of instructions issued by the Secretary

of the Treasury on the 27th day of June, A. D. 1865. So much of that series of instructions as are material to this inquiry, are as follows:

CIRCULAR LETTER OF INSTRUCTIONS

TO

OFFICERS OF THE TREASURY DEPARTMENT

RELATIVE TO

COMMERCIAL INTERCOURSE, CAPTURED, ABANDONED, AND CONFISCABLE PROPERTY, FREEDMEN, ETC.

TREASURY DEPARTMENT, *June* 27, 1865.

The various rules and regulations heretofore prescribed by the Secretary of the Treasury, in regard to the above named subjects, having been rendered nugatory in whole or in part by the changed condition of affairs in the Southern States and Executive orders and proclamations, and the War Department having assumed charge of freedmen, abandoned lands, &c., under the provisions of the act of Congress, approved March 3, 1865, the following instructions as to the duties of officers of the Treasury Department in the premises are prescribed and will be regarded as in full force and effect immediately on the receipt thereof by any officer whose action is in anywise affected thereby:

1. All restrictions on commercial intercourse in, and with States, and parts of States, heretofore declared in insurrection, and on the purchase, *transportation*, and sale of the products thereof, are removed; *except* as to the transportation thereto or therein of arms, ammunition, articles from which ammunition is made, gray uniforms, and gray cloth; and *except*, *also*, those relating to property heretofore purchased by the agents *or captured by or surrendered to the military forces of the United States*. Nor will any fees or taxes be charged or collected except those imposed by the customs and internal revenue laws. And the supervision necessary to prevent the shipment

of the prohibited articles will be exercised only by the regular and ordinary officers of the customs, acting under the revenue laws of the United States.

2. Subordinate officers discharging duties in regard to commercial intercourse, under the regulations referred to, will consider their official connection with this Department as terminating with the 30th instant, without further notice.

3. Agents for the purchase of products of insurrectionary States on Government account will close their official business, east of the Mississippi, with the transactions of the 13th instant; and west of it, with the transactions of the 24th instant; returning to sellers all property or money received or collected since those dates, respectively, and using such dispatch in the premises that their connection with the Department may, if possible, terminate with the 30th instant.

4. Officers of this Department charged with the duty of receiving and collecting, or having in their possession or under their control captured, abandoned or confiscable personal property, will dispose of the same, in accordance with regulations on the subject heretofore prescribed at the earliest time consistent with the public interests, *and will refrain from receiving such from military or naval authorities after the 30th instant.* This will not be construed, however, as interfering with the operations of the agents *now* engaged in receiving or collecting the property recently captured by or surrendered to the forces of the United States, whether or not covered by or included in the records, &c., delivered to the United States military or Treasury authorities, by rebel military officers or cotton agents. Those so acting will continue to discharge the duties thus imposed until such property is all received or satisfactorily accounted for, and until the amount so secured is shipped or otherwise disposed of under the regulations on the subject heretofore prescribed. And they will use all the means at their command, with the utmost vigor, to the end that all the property so collected, captured, or turned over, shall be secured to the United States with the least possible cost and delay.

After the 30th instant, the duty of receiving captured

and abandoned property not embraced in the above exception will be discharged by the usual and regular officers of the customs, at the several places where they may be located, in accordance with regulations relating to the subject; and officers heretofore performing that duty will give them all the aid and information in their power to enable them to carry out the same.

These instructions may be found in the volume of "Acts of Congress, and Rules and Regulations of the Treasury Department," to which we have heretofore referred, pp. 137, 138.

These instructions received judicial interpretation in the case of *McLeod* vs. *Callicott*, decided in the United States Circuit Court, for the district of South Carolina.

In that case, Callicott, was an agent of the Treasury Department, and acting as such agent, he seized and took from the possession of McLeod, in the month of October, 1865, thirty-nine bales of cotton. McLeod brought an action of trespass against the Treasury agent for the value of the cotton. The agent justified the taking, averring that what he did was done as special supervising agent of the Treasury Department, and in accordance with law.

Mr. Chief Justice CHASE, in charging the jury, directed their attention to the consideration of the sufficiency of this plea, stating the question which it presented, as follows: "Was the defendant justified in what he did by virtue of his office as supervising agent of the Treasury?" In discussing this question, the learned Chief Justice used the following language:

"Under several acts of Congress, during the late war, supervising agents of the Treasury Department, were appointed in the several insurgent States, and charged with certain specific duties. Among these duties was that of receiving from the military officers of the United States, all property captured by them, with instructions to turn

it over to the proper authorities of the United States for sale and for account. In respect to a citizen who had maintained a loyal adhesion to the Government of the United States, it was provided by law that this property or the proceeds should be returned to them upon making the necessary proofs in the Court of Claims, at any time within two years from the close of the rebellion. It is alleged, and not denied, that Callicott had this general authority. It was his duty to receive from the military officers and from private soldiers, all property captured by the forces of the United States, during the recent war, within his agency. If this case depended upon this general authority, the only question to be determined would be whether the cotton in question was captured property. But there is something more in this case. These supervising agents were appointed by the Secretary of the Treasury, under regulations approved by the President of the United States, and were subject, in all respects, to his discretion and control, *and the general regulations established had relation only to a state of war.* Now, actual hostilities between the insurgent States and the United States terminated, practically, in May, 1865. In the State of South Carolina a provisional government was organized under a proclamation of the President, in June or July of that year, and the Secretary of the Treasury, having reference to this changed condition of affairs, on the 27th of June, 1865, addressed a circular to those treasury agents, in which he prescribed a rule for their government in the new state of things."

Reading from the fourth section of these regulations, the Chief Justice continued:

"This section provides that officers charged with the duty of receiving and collecting, or having in their possession or under their control captured, abandoned, or confiscable personal property, will dispose of the same in accordance with regulations heretofore prescribed, and refrain from receiving such from military or naval authorities after the 30th instant."

"The general regulation which required Mr. Callicott to receive all captured property from the officers of the United States was thus rescinded on the 27th June, 1865, with the following limitation:

'This will not be considered as interfering with the operations of agents now engaged in receiving or collecting the property *recently captured by or surrendered* to the forces of the United States, whether or not covered by or included in the records delivered to the United States military or Treasury authorities by rebel military officers or cotton agents.'

"The new regulation or prohibitory order, therefore, did not extend to property which had been captured or surrendered by the military officers of the Confederate States, to the United States. *But with that exception the prohibition is complete, and final, and no agent of the Treasury Department, was justified in receiving after the 30th of June*, 1865, *any captured property, unless theretofore surrendered; much less was any such officer warranted in making any capture of unsurrendered cotton himself after that date, with or without military aid. He had no authority to do so.* All his powers, as we have said to you, were derived from the Treasury Department, and when the Treasury Department withdrew that general authority, it was at an end.

"The question, then, in this case is, whether this was part of the property which had been surrendered by the military authorities of the Confederate Government, to the United States, prior to the 27th of June, 1865. You have heard all the evidence, and it is your province to determine whether or not this property was in that category. If it was, then it was Callicott's duty to receive it, and transmit it to the authorities of the United Sates for sale, and the only remedy which the owner or claimant of the cotton could possibly have, would be by application to the Court of Claims of the United States. The whole matter seems to be narrowed down to the simple proposition, whether the evidence before you satisfies your minds that this cotton was included in the surrender referred to in the Secretary's instruction of the 27th June. If it was so included, then the court charges you that neither the action of the provost court, relied upon by the defendant, nor the action of any State court, could withdraw it from that category without the consent of the United States. If it was on the 27th of June captured property in this sense, that is, property surrendered by the military authorities of the Confederate Government to the United States, then it remained cap-

this Court, discussing the legality of the seizure involved in that case, said:

"It is well known that cotton has constituted the chief reliance of the rebels for means to purchase the munitions of war in Europe. * * * * The rebels regard it as one of their main sinews of war; and no principle of equity or just policy required, when the national occupation was itself precarious, that it should be spared from capture and allowed to remain an element of strength to the rebellion."

And in the case of *Lamar* vs. *Browne et al.*, 92 U. S. R., 194, the learned Chief Justice, again speaking for the court upon this question, said:

"That cotton, though private property, was a legitimate subject of capture, is no longer an open question in this court. It was the foundation on which the hopes of the rebellion were built. It was substantially the only means which the insurgents had of securing influence abroad. In the hands of private owners it was subject to forced contributions in aid of the common cause. Its exportation through the blockade was a public necessity. It is not too much to say that the life of the Confederacy depended as much upon its cotton as it did upon its men. If they had had no cotton they would not have have had, after the first year or two, the means to support the war. To a very large extent it furnished the munitions of war, and kept the forces in the field. It was, therefore, hostile property, and legitimately the subject of capture in the territory of the enemy."

It follows, from these authorities, that the seizure of cotton, which was private property, was only justified during the late rebellion, because of its peculiar character as a special element of strength to the insurgents. *Its capture was justified only for that reason.* Therefore, the right to seize such property terminated as soon as those engaged in carrying on the rebellion had submitted to the authority of the United States. The seiz-

ure of such property upon grounds of public necessity, after that time could not be justified. It is only *public necessity* that ever justifies the seizure of private property for public use. The existence of the rebellion created the *necessity;* and the peculiar character of this property, as the chief means of sustaining the rebellion, furnished the *justification* for its capture by the United States. But the right to seize such property, for these reasons, did not survive the overthrow of the military and naval power of the rebellion. No nation would be justified in the continued use of such a right after the causes which authorized the exercise of such a power had ceased to exist. If the United States had continued to exercise this power after the armed forces of the rebellion had surrendered, it would have brought upon itself the just condemnation of all civilized nations. It would have violated the generous principles and just obligations of the public law, as declared in all the authorities on international law.

Phillimore, speaking of these obligations, used the following language:

"When, by the use of the legal means of war, the invaded right has been obtained or secured, or the inflicted injury redressed, or the threatened danger averted, the *abnormal* state of war must cease; the normal state of peace be re-established.

"We are, indeed, admonished by Grotius, that if a peace *sufficiently safe* can be had, it is not ill obtained even by condonation of injuries, damages and expenses, especially among christians; for to them their Lord has bequeathed peace as his peculiar legacy to them; the chosen interpreter of their Lord's testament has made peace the theme of his most earnest exhortations. If this most admirable doctrine be too excellent for the present condition of the society of States, it may at least be propounded as an unquestionable proposition of in-

ternational jurisprudence, that there is a legal as well as a moral necessity, *that with the ceasing of the causes which justified the inception of the war, the war itself should cease.* In the event, therefore, of a war unlawfully continued, though lawfully begun, it would be morally and legally competent to States who have taken no part in the conduct of the contest, to combine for the purpose of compelling the termination of war, and the restoration of peace. The State which continues the evils and horrors of war unrighteously, is but little, if at all, less than an offender against the society of societies—against the great commonwealth of States, than the original wrong-doer."

Phillimore's International Law, vol. 3, part 12, pp. 442, 443.

Halleck, on International Law, discussing this question, says:

"It has been laid down as an unquestionable proposition of international law, that there is a legal as well as a moral necessity that with the ceasing of the causes which justified the inception of the war, the war itself should cease. Vattel enforces the obligation to seek peace as the end of war; and argues that no matter how just the war may have been at the commencement, it must not be continued beyond its lawful object, which is to procure justice and safety, and the moment an equitable compromise can be procured, it should cease."

Halleck's International Law, pp. 844, 845.

Vattel, Book 4, Chap. 1, Sec. 7, p. 432, discussing this question, uses the following language:

"*When one of the parties is reduced to sue for peace*, or both are weary of the war, then thoughts of an accomodation are entertained, and the conditions are agreed on. Thus peace steps in and puts a period to the war."

There was, at the time the claimants' cotton was seized, a *de facto* cessation of hostilities by both belligerents. No proclamation of the President of the United States

was necessary to enable the courts to ascertain and determine the time when that *de facto* cessation of hostilities between the two belligerents occurred. Courts always take judicial notice of the happening of such important historical facts. There was, at that time, peace *de facto* if not *de jure*.

At the time the appellants' cotton was seized military operations against the insurgents had ceased in all of the insurrectionary States; and on the 21st day of June, 1865, the President appointed a Provisional Governor for the State of Alabama, and on that day the Attorney General, was directed to cause the United States courts to be re-opened in that State; and the other executive departments of the United States, were directed to put in force in that State the laws of the United States, relating to their respective departments.

13 Stats. at Large, 767, 768.

Mr. Chief Justice CHASE, in the case to which we have above referred, decided that the general regulations, issued by the Secretary of the Treasury to these special Treasury agents, had "*relation only to a state of war;*" and that the new instructions, issued on the 27th day of June, 1865, were issued because hostilities had been "practically terminated in May, 1865;" and these were to be the rules by which those agents were to be governed "*in the new state of things.*"

But, if the fact had been otherwise; if the war had still continued, the Treasury agent would have had no authority, *on his own motion*, to seize and *appropriate* to the use of the Government the private property of an enemy; for it is well settled, as part of the law of nations, that, although all the subjects of one section or nation are to be regarded as the public enemies of all the citizens or subjects in the other section or nation, where the two sections or nations are engaged in public war,

this does not authorize the citizens of one section or nation to pillage or plunder the private property of the citizens of the other belligerent section or nation. The United States has steadily maintained the right of employing privateers against their public enemies, but such privateers must be licensed, and authorized as such, by the United States. Privateering thus becomes the act of the Government. But the United States has never maintained the right of its citizens to engage in the despoiling of its public enemies at their own pleasure.

Kent, on International Law, Abdy. Ed., 1866, pp. 246, 247, says:

"Although war puts all the subjects of the one nation in a state of hostility with those of the other, yet, by the customary law of Europe, *every individual is not allowed to fall upon the enemy.* If subjects confine themselves to simple *defense* they are to be considered as acting under the presumed order of the State, and are entitled to be treated by the adversary as lawful enemies, and the captures which they make in such a case are allowed to be a lawful prize. *But they cannot engage in offensive hostilities without the express permission of their sovereign; and if they have not a regular commission as evidence of that consent, they run the hazard of being treated by the enemy as lawless banditti, not entitled to the protection of the mitigated rules of modern warfare.*"

See also Harg. Law Tracts, 145, 246, 247;
Marten's, 1 vol., book 8, ch. 3, sec. 2.

And again, at page 248, the same writer says:

"Sir Matthew Hale held it to be *depredation* in a subject to attack the enemy's vessels, except in his own defence, without a commission. The subject has been repeatedly discussed in the Supreme Court of the United States, and the doctrine of international law is considered to be, that private citizens cannot acquire a title to hostile property

unless seized under a commission, but they still may lawfully seize hostile property *in their own defence.*"

Brown vs. *United States*, 8 Cranch., 132;
The Neriade, 9 Cranch., 449;
Dos Hermanos, 2 Wheaton, 76, and 10 Wheaton, 306;
Amiable Isabelle, 6 Wheaton, 1.

Whatever may be the rule as to privateering upon the seas in time of war, no civilized nation ever did or will maintain the right of its subjects, without its authority, to plunder on the land the private property of the subjects of another nation with which it is at war. And no civilized nation would treat persons so engaged otherwise than as thieves, marauders, and outlaws.

But, it may be replied to these suggestions, that this court, in the case of *Lamar* vs. *Browne et al.*, 92 U. S. R., 197, has *reversed* the decision of Chief Justice Chase, in the case of *McLeod* vs. *Callicott*.

It is appropriate, therefore, to examine that case, in order that we may understand what were its facts, and what were the legal propositions declared as resulting from those facts. In that case, as in the case of *McLeod* vs. *Callicott*, the suit was brought by the owner of the property seized, against the Treasury agent, to recover the value of the property. The Treasury agent justified the seizure, as an agent of the United States, to receive and collect abandoned or captured property under the several acts of Congress providing therefor. *The cotton had been captured by the military authorities on the* 19*th day of June, A. D.* 1865, *and was by those authorities turned over to the Treasury agent on the* 15*th day of August*, 1865.

The only question which that case really presented, was, whether the Treasury agent, was personally liable for receiving the cotton from the military authorities and sending it forward for sale on behalf of the United States.

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The only question which that case really presented, was, whether the Treasury agent, was personally liable for receiving the cotton from the military authorities and sending it forward for sale on behalf of the United States.

This court, in determining that question, considered: 1st. The liability of the captors—the military agents; 2d. The liability of the Treasury agent for disposing of the cotton after he had received it from the captors.

In deciding the first of these questions this court used the following language:

"We are clearly of opinion that, under these circumstances, no action could have been maintained against Colonel Kimball for his acts in the premises. So far as he was concerned *the plaintiff could only look to the United States for redress.*"

Lamar vs. *Browne et al.*, 92 U. S. R., 199.

The court rest this conclusion on the principles declared in the following well known authorities:

In Phillimore's International Law, vol. 3, p. 192, sec. 130, this question is discussed, and the following language used:

"It should also be observed that, according to the English law, which in this respect is in accordance with the principles of general law and public jurisprudence, no action can be maintained in *a court of municipal law* against the captor of booty or prize. If an English naval commander seizes property as belonging to an enemy which turns out clearly to be British property, he forfeits his prize in a Court of Admiralty, and that court awards the return of it to the party from whom it was taken; but the case of *Lesaux* vs. *Eden*, (2 Douglas, 594), decided that no British subject can maintain an action against the captor.

* * * * * *

In like manner property taken under color of military authority falls under the same rule. If property be taken by an officer under supposition that it is the property of an enemy, whether of a State or an individual, which ought to be confiscated, *no municipal court* can judge of the propriety or impropriety of the seizure. It can be judged only by the authority delegated by the crown."

In *Elphinstone* vs. *Bedreechund*, (1 Knapp's P. C. R., 300), Lord TENDERDEN, delivering the opinion of the court, said:

"We think the character of the transaction was that of a hostile seizure made, if not *flagrante*, yet *nondum cessante bello*, regard being had both to the time, the place, and the person, and consequently that *the municipal court* had no jurisdiction to adjudge upon the subject; *but, that if anything was done amiss, that recourse could only be had to the Government for redress.*"

Lindo vs. *Rodney*, 2 Douglas, 613;
Alexander vs. *The Duke of Wellington*, 2 Russ. & M., 54;
The Army of the Decan, 2 Knapp, P. C. R., 106;
Nichols vs. *Goodall*, 10 Vesey, 156;
Hill vs. *Reardon*, 2 Sim. & S., 431;
Duckworth vs. *Tucker*, 2 Taunt., 7.

An examination of these authorities will show that they involved questions relating to the power of *municipal* courts, to afford relief for injuries committed by persons acting in an *official* character, and doing acts for which it was held that the Government of the officer was responsible, and the *only remedy* to be found was in the courts provided for the determination of questions arising between the citizen and the crown. None of these cases involved or decided the questions which we here present. None of them involved the question whether a government was liable for the seizure of private property, *jure belli*, when a state of war had ceased to exist and peace prevailed. None of them involved the question of the liability of the Government for the illegal acts of its officers and agents, after such acts and the benefits and fruits thereof had been received by the government of the wrong-doer and the illegal and wrongful act of the public agent expressly assumed, adopted, and ratified by his government, and such agent absolved and released from all

liability to the citizen by reason of the illegal act. On the contrary, the language of these cases implies that the Government ought to answer for the wrong committed, although the officer would not be liable therefor. The remedy, at that time, in England, would have been by petition to the Crown; here it is by petition in the Court of Claims.

In regard to the second question, the liability of the Treasury agent, the Chief Justice used the following language:

"The only remaining question to be determined is whether these defendants occupy any different position, so far as this action was concerned, from the actual captors. They were the agents of the Government, appointed under the authority of law, 'to receive and collect all * * * * *captured property*.' Their duty was to have it disposed of according to the requirements of the law, and to see that the proceeds went into the Treasury. If they followed the law after the property came into their hands, they were no more liable to suit by the owners than were the original captors. They were a part of the machinery by which the Government executed the trust it assumed, at the time of the capture, in favor of its loyal citizens. For their guidance, instructions were from time to time issued by the Treasury Department, in connection with the other Executive Departments of the Government. These instructions were specific, and intended as well for the protection of the rights of the owners under the law as those of the Government.

It is claimed, however, by the plaintiff that under an order issued by the Treasury Department, bearing date June 27th, 1865, Kimball (the captor) was not permitted to turn this property over to Browne (the Treasury agent), and Browne was prohibited from receiving it. We do not so understand this order, for it expressly provided that it was not to be construed as interfering with the operations of the agents then engaged in receiving or collecting the property recently *captured* by or surrendered to the forces of the United States, and that those

so acting should continue to discharge the duties thus imposed until such property should all be received or satisfactorily accounted for, and until the amount so secured was shipped or otherwise disposed of under the regulations prescribed upon that subject. *This property, as we have seen, had been captured by the military forces only a few days before the order was made, and was, therefore, expressly excepted from its operation.*"

Lamar vs. *Browne et al.*, 92 U. S. R., 199, 200.

The distinction between that case, and the case at bar is so marked and so obvious, that it is not useful to do more than point out those facts which are most prominent, and peculiar to each. In *that case*, there had been a *military* seizure of the cotton previous to the time the Treasury regulations of June 27th, 1865, were issued. In this case, the military authorities never had possession, control or custody of the cotton. In that case, the Treasury agent received the cotton from the military authorities. In this case, the Treasury agent received the cotton by consignment made thereof to him by the appellants. In that case, the owner of the cotton had been a traitor, and based his right to the proceeds of his cotton upon the fact of his pardon. In this case, the owners of the cotton gave neither aid or comfort to the late rebellion. It is submitted, therefore, that the case of *Lamar* vs. *Browne et al.*, does not, in any respect, conflict with, or overrule the case of *McLeod* vs. *Callicott;* and that the principles of the last-named case must be held applicable to the case under consideration; and if the principles of that case, or the principles of the public law, to which we have directed the attention of the court, shall be applied to the case at bar, then this court must necessarily conclude that the seizure and appropriation of the cotton belonging to the appellants, by the Treasury agent, was an act unauthorized by either the statute or the public law.

B.—The subsequent sale of the cotton in New York by another agent of the United States, was equally unauthorized, and such agent might have been sued in an action *ex delicto* for the sale, or *ex contractu* for the proceeds, and to such action he could have made no defense. That agent subsequently paid the proceeds resulting from the sale over to the United States, and they were covered into its Treasury.

If a principal, by his agent, wrongfully seizes the property of another, and by such agent, or a second agent acting in concert with the first, converts the property into money and receives the avails, the owner may waive the tort and sue in *assumpsit* for the money so received upon an *implied* contract, as for money had and received to the use of the owner.

It is also well settled that a principal is not liable for the mere *tort* of his agent committed beyond the scope of the agency, unless he ratifies the act of such agent, as by receiving the avails of the property unlawfully taken, or in some other manner. But as soon as the principal ratifies the wrong of his agent he becomes responsible for it, and may be sued *ex delicto*, or the party injured may waive the tort and sue *ex contractu* for the avails received by the principal.

It is also well settled that a government is not liable for the wrong committed by its agents or public officers unless the government subsequently ratifies the wrongful act. But after such ratification the injured party can no longer pursue the officer, either civilly or criminally, but must appeal to the government for redress. *Buron* vs. *Denman*, 2 Exchequer Repts., 167, is *judicial* authority for such immunity of the officer after ratification by his government. In that case the language of the Court upon this question is as follows:

"If an individual ratifies an act done on his behalf, the nature of the act remains unchanged—it is still a mere trespass, and the party injured has his option to sue either; *if the crown ratifies an act, the character of the act becomes altered; for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the crown only, and actually exempts from all liability the person who commits the trespass.*"

The correspondence between Mr. Webster, Secretary of State, and Mr. Fox, the British Minister, in regard to the immunity of McCleod, in relation to the burning of the "*Caroline*," is *diplomatic* authority for the same principle as part of the law of nations. Webster's Works, vol. 6, p. 250.

One distinction, however, exists in regard to the remedy of the injured party, between those cases where the principal is an individual and those cases where a sovereign government assumes the tort of its public officers. In the former case the party may sue for the tort, or he may waive the tort, and sue in *assumpsit* for the avails received by the principal, in money, as a consequence of the wrong committed.

In the latter case he cannot sue the ratifying sovereign without that sovereign's consent, and if such sovereign consents to be sued, the party injured must bring such action, and take such proceedings as the sovereign permits. Whether the sovereign will be sued for the tort as such, or *ex contractu* for the benefit derived from the wrongful act, or not at all, is a matter for the sovereign to determine. The United States has never consented to be sued *ex delicto*. Therefore, no matter how flagrant a wrong or tort may be committed by any of their officers, they cannot be compelled to respond as for the tort. But they have consented in the act establishing this court to be sued "upon a contract express or *implied*."

The logical conclusion is, that while the Government will not be sued in tort, and thus be made responsible for *all the damages* which an injured person may have suffered from the wrongful act of its public officers, it does consent to be sued upon an *implied* contract *for such benefit as it has realized from the wrong committed.*

C.—The facts stated by the Court of Claims in their findings are sufficient to create an implied contract, which could be enforced in that court against the United States, and upon such contract the appellants' would be entitled to recover from the United States the amount which they have received as the proceeds resulting from the seizure and sale of the appellants' cotton.

This proposition presents the question whether the United States are liable upon an *implied* contract upon the facts certified by the Court of Claims.

What is an implied contract, or in what cases may the action of *assumpsit* be maintained? Halleck declares what would be the obligations of the public law, upon such a state of facts, in the following language:

"A seizure *jure belli*, made in time of peace, is a wrongful act, and the injured party is entitled to restitution, and the Government of the captor *is bound to repair the wrong* which was committed through ignorance by its subject."

Halleck's International Law, p. 856, sect. 15;
Wheaton's, Ibd, p. 4, chap. 4, sect. 5.
Phillimore's, Ibd. vol. 3, sects. 518, 519.

Implied contracts are said to "form the web and woof of actual life." Such contracts are declared to be coordinate and commensurate with *duty*. They rest upon that familiar principle which declares that "whatsoever

it is certain that a man ought to do that the law supposes him to have promised to do;" and Blackstone, speaking of these contracts (vol. 2, p. 443), says:

"Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform."

Chitty on Contracts, 11th American edition, volume 1, page 84, says:

"There are, likewise, cases in which the law raises a promise even from the wrongful acts of a party, and in which the courts will not admit evidence of his intention to commit a *tort*, in order to negative such implied promise, for no man can set up or take advantage of his own wrong. * * * * An action (*assumpsit*) lies to recover the value of goods as sold to the defendant, if he by fraud induces the plaintiff to sell them to an insolvent person, and afterwards obtains them for his own benefit."

Hill vs. *Perrott*, 3d Taun., 274;
Abbott vs. *Barry*, 5 Moore, 98;
Ed. Meads vs. *Newman*, 1 B. and C., 48.

And again, 2 vol., p. 905:

"There are also many cases in which the plaintiff may waive a *tort* committed by the defendant, and through the medium of which he has received money belonging to the plaintiff, and sue as for money had and received; as where the defendant tortiously takes and receives the plaintiff's money, *or takes his goods and sells them and receives the proceeds.*"

Lamaine vs. *Dorell*, 2 Ld. Raym., 1216;
Foster vs. *Stewart*, 3 M. and S., 191;
Young vs. *Marshall*, 8 Bing., 43.

An action for money had and received may be maintained whenever the defendant has received *money* which is the property of the plaintiff, and which the defendant

is obliged, by the ties of natural justice and equity, to refund.

Carey vs. *Curtis*, 3 How. S. C. R., 249.

In that case, Mr. Justice STORY, in a dissenting opinion, upon other points, used the following language:

"It is an entire mistake to say that the action of *assumpsit* for money had and received is founded upon a voluntary, express, or implied promise of the defendant, or that it requires priority between the parties, *ex contractu*, to support it. The rule of the common law has a much broader and deeper foundation. Whenever the law pronounces that a party is under a legal liability or duty to pay over money belonging to another which he has no lawful right *to exact or retain from him*, then it forces the promise upon him, *in invitum*, to pay over the money to the party entitled to it. It is the result of the potency of the law, and is in no shape dependent upon the will or consent of the voluntary promise of the wrongful possessor."

In *Nash* vs. *Towne*, 5 Wallace, 702, the following language is used:

"Assumpsit for money had and received is an equitable action to recover back money which the defendant in justice *ought not to retain;* and it may be said that it lies in most (if not all) cases where the defendant has moneys of the plaintiff which, *ex equo et bono*, he ought to refund."

Moses vs. *Macfarlan*, 2 Burrows, 1008, 1012;
Clark vs. *Shee*, Cowper, 197, 199, 200;
Buller vs. *Harrison*, Cowper, 565;
Chillon vs. *Broidon*, 2 Black., 460;
Castle vs. *Bullard*, 23 Howard S. C. R., 189;
Olmstead vs. *Hotailing*, 1 Hill R., 318;
Per Tyndall, C. J. Smith, vs. *Jones*, 6 Juris., 583;
Eddy vs. *Smith*, 13 Wend., 588;
Wright vs. *Burler*, 6 Wend., 200;
Irvine vs. *Hanlon*, 10 Serg. and R., 219;
Rogart vs. *Novins*, 6 Serg. and R., 369;

Murphy vs. *Barron*, 1 H. and Gill, 258;
Guthrie vs. *Hyatt*, 1 Harring., 447;
Teris vs. *Brown*, 3 J. J. Marsh, 175;
Martzell vs. *Stauffer*, 3 Pen., 398;
Allen vs. *McKeon*, 15 Sumner, 317;
Glass vs. *Lobdell*, Walker (Miss.), 105;
Hatton vs. *Robinson*, 4 Blackf., 480;
Rathbone vs. *Stocking*, 2 Barb., 135;
Wilson vs. *Sargent*, 12 Ala., 778;
Buell vs. *Boughton*, 2 Denio, 591;
Knapp vs. *Hobbs*, 50 N. H., 478.

The Court of Claims, in the case of the *State National Bank of Boston* vs. *The United States*, 10 Court of Claims R., 519, recognized the force of these principles, in their application to suits against the United States, in the following language:

The true character of this action is that of a common-law action of *assumpsit* for money had and received. The principles and rules applicable to that form of action belong to the elementary knowledge of the bar and the courts. In its spirits and objects it has been likened to a bill in equity; and it lies whenever the defendant has received or obtained possession of the money of the plaintiff, which, in equity and good conscience, he ought to pay over to the plaintiff. And in order to support this action there need be no privity of contract between the parties, except that which results from one man's having another's *money* which he has not a right conscientiously to retain.

10 Court of Claims R., 545.

The decision of the Court of Claims in that case was affirmed by this court at its last term.

United States vs. *State Bank*, 96 U. S. R., 30, 33.

In deciding that case, this court announced the following propositions:

1. Where a trust fund has been perverted the *cestui que trust* can follow it at law as far as it can be traced.

2. The United States cannot, against the claim of an innocent party, hold his money which has gone into its Treasury by means of the fraud of its agent.

3. The rules of law applicable to an individual in like cases apply to the United States. Its sovereignty is in no wise involved.

In reaching these conclusions, the court used the following language:

"The interposition of equity is not necessary where a trust fund is perverted. The *cestui que trust* can follow it at law as far as it can be traced.

May vs. *LeClaire*, 11 Wall., 217;
Taylor et al. vs. *Plumer*, 3 Maule & Sel., 562.

"Where a draft was remitted by a collecting agent to a sub-agent for collection, and the proceeds were applied by the sub-agent in payment of the indebtedness of the agent to himself, in ignorance of the rights of the principal, this court held that there being no new advances made, and no new credit given by the sub-agent, the principal was entitled to recover against him.

Wilson & Co. vs. *Smith*, 3 How., S. C. R., 763;
Bank of the Metropolis vs. *The New England Bank*, 6 How., S. C. R., 212.

"A party who, without right and with guilty knowledge, obtains money of the United States from a disbursing officer, becomes indebted to the United States, and they may recover the amount. *An action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obliged by natural justice and equity to refund.* THE FORM OF THE INDEBTEDNESS OR THE MODE IN WHICH IT IS INCURRED IS IMMATERIAL.

Bayne et al., Trustees, vs. *United States*, 93 U. S. R., 642.

"In these cases, and many others that might be cited, the rules of law applicable to individuals were applied to the United States. Here the basis of the liability insisted upon is an implied contract, by which they may well

become bound in virtue of their corporate character. Their sovereignty is in no wise involved. But, surely, it ought to require neither argument nor authority to support the proposition that, where the money or property of an innocent person has gone into the coffers of the nation by means of a fraud to which its agents was a party, such money or property cannot be held by the United States against the claim of the wronged and injured party.

"The agent was agent for no such purpose. His doings were violated by the underlying dishonesty, and could confer no rights upon his principal."

96 U. S. R., 35, 36.

In that case the fraud of the agent—the cashier of the United States sub-Treasury, consisted in converting to the use of the United States, in order to cover his own embezzlement gold certificates, amounting to the sum of four hundred and eighty thousand dollars, belonging to the State Bank; which certificates the agent knew were not the property of the United States.

In this case, the agent knew that the cotton which the appellants had consigned to him was their individual property, and yet, with full knowledge of that fact, he caused it to be shipped to the United States cotton agent in New York, by whom it was sold; and the proceeds resulting from such sale were paid into the National Treasury. In this case, the proceeds resulting from the unlawful conversion, appropriation, and sale of the property belonging to the appellants have gone "*into the coffers of the nation*" by means of the wrongful act of an agent of the United States; and it is no defense to the consequences of such act, to urge that it was done and consummated by the authority or direction of the Secretary of the Treasury. But the order of that officer to make the seizure would not justify the trespass. An

order to commit a trespass would afford no justification to the officer by whom it was executed.

Mitchell vs. *Harmony*, 13 How., pp. 115, 137.

Even if such authority and direction could release the agent from liability, it would not release the United States if it retained the fruits of the wrongful or fraudulent acts of its agents.

But it is evident that Congress intended that the avails of cotton seized and sold subsequent to June 30, 1865, should be restored to the owners thereof. This intent is manifest from the 5th section of the act of May 18, 1872, as follows:

"SEC. 5. That the Secretary of the Treasury be, and he is hereby, authorized and directed to pay to the lawful owners, or their legal representatives, of all cotton seized after *the thirtieth day of June, eighteen hundred and sixty-five*, by the agent of the Government unlawfully and in violation of their instructions, the net proceeds, without interest, of the sales of said cotton actually paid into the Treasury of the United States: *Provided*, That the receipt thereof shall be taken and received in full satisfaction of all claims against the United States for or on account of the seizure of said cotton; and a sufficient sum for such payment is hereby appropriated out of any money in the Treasury not otherwise appropriated: *And provided further*, That the foregoing provisions shall not apply to any claim now pending before the Court of Claims, nor to any claim not filed in the Treasury Department within six months after the passage of this act; and the sum of twenty thousand dollars is hereby appropriated for the payment of the necessary expenses of defending the United States in respect to claims for said proceeds, to be expended under the direction of the Secretary of the Treasury."

17 Stats. at Large, p., 431.

This act must be regarded as a declaration by Congress that the avails of the sales of all cotton seized

after the 30th June, 1865, equitably belonged to the owners thereof. It cannot be presumed that Congress intended, by the *second proviso* of this act, to punish those who, prior to the date of the act, had asserted their just rights in the Court of Claims. Although the act does not apply to this particular case, because the petition had been filed before the date of this act, yet the act may be relied upon as a Congressional declaration that the avails of cotton seized and sold after June 30, 1865, ought to be restored to the owners.

This declaration taken in connection with the principle of the common law that money in the hands of the defendant, equitably belonging to the plaintiffs, may be recovered in *assumpsit*, brings this case within the provision of the act of Congress establishing the Court of Claims, which provides that it shall have jurisdiction of all actions founded upon an *implied* contract against the Government.

The appellants' case is also within the principle declared by this court in the case of *The United States* vs. *The State Bank*, above cited, because the defendant has received money which is the property of the appellants, which the United States is obliged, by natural justice and equity, to refund; and it is no defense to urge that the money came into the possession of the United States by means of the illegal acts of its agents, since "*the form of the indebtedness or the mode in which it is incurred is immaterial.*"

D.—The remedy of the appellants for the unlawful seizure and sale of their cotton, and the payment of the proceeds thereof into the National Treasury, was not that which was provided in the third section of the act of Congress, approved March 12, 1863.

This question is properly presented by the appellants' demurrer to the *second* plea filed on behalf of the United States. Its determination presents for consideration the question whether there is any remedy in the Court of Claims, *for the* UNLAWFUL SEIZURE AND APPROPRIATION *of the cotton of loyal citizens by an agent of the United States* except such as was provided in the *third* section of the act of March 12, 1863. So much of that section as is material to this inquiry is as follows:

"And any person claiming to have been the owner of any such *abandoned or captured property* may at any time within two years after the suppression of the rebellion prefer his claim to the proceeds thereof in the Court of Claims; and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, to receive the residue of such proceeds, after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof."

12 Stats. at Large, 820.

The object and purpose of this statute was to create both a right and a remedy, where none existed before its passage. Its benefits were limited to those who could prove to the satisfaction of the court that they had given neither aid or comfort to the rebellion. It was limited in its effects to the restoration of the proceeds of property which had been "*abandoned or captured.*" There was no *legal obligation* resting upon the United States, to restore to any one any part of the money which the United States, had derived from the receipt, and sale of "*abandoned or captured property.*" The seizure and sale of such property, and the payment of the proceeds into the National Treasury, while the said act and the Treas-

ury regulations for its execution were in force, created neither an *express* nor an *implied* obligation upon the United States, to restore such proceeds, because such seizure and sale was authorized and lawful. The right to have a restoration of such proceeds was only and exclusively a statutory right, and this court truly said, in the case of *Klein* vs. *The United States*, 13 Wall., 138, that "there is no similar legislation mentioned in history." There could have been no recovery in the Court of Claims, under the act establishing that court and defining its jurisdiction, for a seizure of cotton *jure belli*. The jurisdiction of the Court of Claims, was extended by the provisions of that act, so as to embrace cases which could not be heard and determined there under the general law. The right and the remedy were entirely the creation of the statute. And this court, and the Court of Claims, have each decided that this *statutory right* can only be secured by pursuing the *statutory remedy*. And while we concede this proposition to its utmost extent, we are not required to admit the conclusion, that this special remedy, applicable to a specific class of cases, in the slightest degree limits or impairs, the jurisdiction of the Court of Claims, in respect to its power under the general law, to hear and determine cases founded upon contracts express or implied. The decisions of this court upon this question only declare that the statutory remedy *for cases within its provisions*, is the exclusive remedy.

The leading case in which the character and extent of the remedy provided by that act have been discussed is the case of *Haycraft* vs. *The United States*, 22 Wall., 81, 92, 98, where the court used the following language:

"The main question presented for our consideration in this case is whether one who gave aid and comfort to the late rebellion can, after the expiration of two years from its suppression, commence and successfully maintain an action in the Court of Claims, for the recovery of

money in the Treasury arising from the sale of his cotton *taken possession of by the United States, and sold under the provisions of the captured and abandoned property act.*

"The case has been argued to some extent, as though it involved the consideration of a statute of limitations. To our minds, the question is one of jurisdiction. A sovereign cannot be sued in his courts except with his consent. * * * It is conceded that the required consent is not contained in the captured and abandoned property act itself, for the only action there consented to is one to be commenced within two years after the suppression of the rebellion. But inasmuch as the United States, has consented to be sued in the Court of Claims upon contracts express or implied, it is contended that this action may be prosecuted on account of an *implied promise* by the United States to pay to every owner of *captured and abandoned property*, whether loyal or disloyal, the proceeds of his property taken and sold."

Again, in this opinion the court use the following language:

"There is here no question of confiscation. The title of the United States, whatever may be the rights it carries with it, is by *authorized* capture or appropriation of enemy's property on land. But the same statute *which authorized the capture*, gave a right to certain persons to demand and receive a restoration of their property taken. Coupled with the right to demand, was a provision for the remedy by which it was to be enforced. Both the right and the remedy are, therefore, created by the same statute, *and in such cases the remedy provided is exclusive of all others.*"

The cotton which was the subject of that suit was seized by the United States military authorities in the State of Mississippi, in the month of April, 1863. In that case the cotton was seized by the military authorities *during the war*, and was in every sense a *military* capture and seizure within the meaning of the act of March 12, 1863. In this case, there was never any capture or

seizure of the cotton by either the *military* or civil authorities; but an *unlawful* appropriation by a Treasury agent after all military operations had terminated and the armies engaged in the suppression of the rebellion, had been mustered out of the service.

In that case, the cotton came into the custody and possession of the United States, in strict accordance with the requirements of the abandoned and captured property act. The seizure in that case was both authorized and lawful. In this case the *appropriation* of the property was made long after the "abandoned and captured property act" had ceased to be operative, for there could not, at the time the appellants' cotton was seized, be any *military* capture thereof.

In the Elgee cotton cases, 22 Wall., 185, Mr. Justice STRONG, delivering the opinion of this Court, said:

"*In regard to such property, only such suits can be brought as are authorized by the statute.* That statute furnishes a complete system for the prosecution of claims under it, *and defines the extent of the rights, which those who claim an interest in the proceeds of property captured during the civil war*, may assert against the Government. According to the well-known rules of statutory construction, the system is exclusive of all others, and the rights defined are the only ones which can be enforced in any judicial proceeding."

In that case, the cotton was seized in the State of Mississippi, on the 2nd day of April 1864.

The case of *Alexander L. P. Green* vs. *The United States*, 10 Court of Claims R., 466, was also a case resulting from a seizure of property in Memphis, Tennessee, which had been *abandoned* by the owner, and seized by a Treasury agent, in December, 1864; and the rent thereof received by such agent until July 8, 1865. Judge NOTT,

delivering the opinion of the Court, stated the question involved, and the conclusions at which the Court arrived, as follows:

"This case presents with unusual clearness the question whether the Government is judicially liable for any of the war measures resorted to in the late rebellion other than the liability created by the *abandoned or captured property act.*

"It may be conceded that the Government is liable, upon express contracts, to persons residing within the insurrectionary districts. Where the officers or agents of the Government entered into an agreement with a person who, for the time, at least, wore the garb of a public enemy, and the Government reaped a positive benefit from the contract, while the contractor made a positive sacrifice on the faith of it; where, in short, there has been gain on the one side and loss on the other, and the gain has been acquired and the loss suffered on the faith of the agreement, such a contract has always been upheld. If the officers of the Quartermaster's Department during the war with Mexico, had entered into contracts in due form, and pursuant to their legal authority, there is no reason for saying that those contracts would not be binding upon the Government. In other words, there is no reason for saying that the Government is debarred from acquiring supplies by contract from the inhabitants of an enemy's country. A different doctrine would be mischievous, injurious to the Government, and abhorrent to the liberal spirit which pervades modern international law."

"But the case before us presents no such question. It in effect goes upon a supposed liability of the Government under these conditions, viz.: for the acts of its officers, *done under color of its authority*, within the insurrectionary districts where the party injured was loyal, and the circumstances were such as would give to a citizen in time of peace a right of action against the Government, under the mandate of the Constitution that private property shall not be taken for public use without just compensation. *Our conclusion is that no such liability exists, and that no such action can be maintained.*"

Concluding the argument by which the court reached its conclusion, the following language was used:

"It has been argued with force that the liability of the Government in this case arose from the fact that the seizure was made by an officer of the Treasury. If it had been made by the Army or the Navy, it is conceded that the court would not have jurisdiction, and that no liability would have arisen. But this question depends upon the one which has previously been discussed. *If the claimant was at the time a public enemy, it is not a matter for him to inquire by what agent of the Government was the injury inflicted or the property taken.* In the prosecution of a war it is immaterial whether it be carried on by those who are under the control of an executive department, or under the control of a military commander. They are in both cases agents of the same belligerent power, and they are both operating to the same hostile end. *What they do are simply the acts of their government, and its liabilities to those against whom it wars cannot be created or measured by the kind of agents which it employs.*

"*The action of the Government here was a war measure. The seizure of the claimant's property was not the taking of private property for public use, but was, to all intents and purposes, a military measure, directed to the end of carrying on the war for suppressing the rebellion.* The object of the statute under which this agent of the Treasury Department acted was two-fold: partly to prevent the means of absent owners engaged in hostilities against the United States from finding their way to them across the military lines, and partly to save the proceeds of such abandoned property for those who might be found ultimately to have been loyal adherents of the Government. The right of action given to them was not a right ordinarily accruing to an enemy against a government, nor a right founded upon the constitutional obligations of this Government, but strictly an act of grace, created and regulated by the statute. If this claimant was entitled to the benefit of that exceptional law, it was for him to have pursued his remedy according to its terms. Failing in that, he has no other legal right to assert, and, consequently, no other judicial remedy to resort to.

"Our conclusion is that the Government is not liable

upon implied contract to any person, loyal or disloyal, for property taken by its agents, civil or military, *during the rebellion within the insurrectionary districts*, and that the only redress given to any person for property captured or seized is that provided by the *Abandoned or Captured Property Act* and the acts amendatory thereof."

10 Court of Claims R., p. 466.

It is manifest that neither of these cases has any application to the case at bar. Each of them resulted from a seizure made in conformity with the provisions of the "Abandoned or Captured Property Act," and when the provisions of that act, and the Treasury regulations to carry its provisions into effect, were in force. Each of them resulted from seizures of property which had been, *in fact, either captured or abandoned*, and while the rebellion was flagrant.

All the cases that have come here by appeal from the Court of Claims, involving questions growing out of the interpretation of that statute, have been cases where the facts brought each of them within the express provisions of that statute. None of them presented a case of seizure and appropriation of private property by the civil authorities after the rebellion had been overthrown, its armies scattered, its leaders fugitives, and civil authority restored in the State where the property was seized.

E.—The appellants' right to maintain their suit in the Court of Claims was not barred by the limitation contained in the tenth section of the act for the reorganization of that court; and their suit was instituted in that court within six years after the cause of action accrued and became cognizable in that court.

The appellants' replication to the *third* plea of the

United States, avers that the appellants' petition *was filed* in the Court of Claims, within six years after the claim accrued *and became cognizable in that court.* The defendant's *third* plea is based on the admission that the appellants' suit is upon an *implied contract;* for that plea would be inapplicable to a suit under the "*Abandoned or Captured Property Act,*" where the right resulted from statutory provisions, rather than from the general principles of the law of contracts.

The statute of limitations in the Court of Claims applicable to contracts, express or implied, is as follows:

"That every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of this act within six years after the claim first accrues."

Act of March 3, 1863, sect. 10;
12 Stats. at Large, p. 767.

The appellants' claim against the United States was not barred by this statute, for the following reasons:

First. This cause of action accrued against the Government when the avails of the cotton were paid into the Treasury in the autumn of 1865. Two of the appellants resided in New Orleans and one in Mobile. Both the States of Louisiana and Alabama, were then in rebellion against the United States, and so remained until the 2d day of April, 1866; and this suit was brought within six years after that time.

It may be urged by the counsel for the Government that the two appellants residing in New Orleans, which was then in possession of Union troops, might have commenced their action in this court prior to the legal termination of the war. There are two answers to this proposition.

In the first place, this claim being a joint cause of action of the two appellants residing in New Orleans and the appellant residing in Mobile, it may be doubted whether suit could be brought thereon in this court except in the name of all the appellants.

Chitty on Contracts, 11th Am. Ed., 908;
Hatsall vs. *Griffith*, 2 C. & M., 679;
Heath vs. *Chilton*, 12 M. & W., 632.

And if part of them could not commence suit, the statute of limitations was suspended until such time as they could.

But, secondly, although New Orleans was occupied by union troops, this fact did not create peace between the citizens of that city and the United States. New Orleans yielded and submitted to military force which it was incapable of resisting; but the disposition and temper of the people remained hostile to the Government; and the continued occupation of New Orleans by the military forces of the Government is conclusive that the state of war was not terminated by the landing of General Butler's forces. On the contrary, the prevailing sentiment of that city was as strongly in favor of the rebellion and against the Government during its occupation by General Butler's forces as ever before; and a withdrawal of the forces would have been followed by immediate acts of hostility against the Government. It was in every sense enemy's country as much as the City of Mexico was enemy's country while occupied by General Scott and his army.

In Mrs. Alexander's cotton case 2 Wall., 419, this court said:

"It is said that though remaining in rebel territority, Mrs. Alexander had no personal sympathy with the rebel

cause, and that her property, therefore, cannot be regarded as enemy's property. But this court cannot inquire into the personal character and disposition of individual inhabitants of enemy territory. We must be governed by the principle of public law, so often announced from this bench as applicable alike to civil and international wars, that all the people of each State or district in insurrection against the United States must be regarded as enemies *until by the action of the legislature and the executive, or otherwise, that relation is thoroughly and permanently changed.*"

And again, at page 421, the court says:

"Mrs. Alexander, being now a resident in enemy territory, and in law an enemy, can have no standing in any court of the United States so long as that relation shall exist. Whatever might have been the effect of the amnesty, had she removed to a loyal State after taking the oath, it can have none on her relation as enemy voluntarily resumed by continued residence and interest."

The principle established by this case is, that all persons residing in States in insurrection, no matter if they were personally loyal to the Union, were *in law* public enemies. From this it follows that no citizen residing in New Orleans could have commenced a suit in this or any other court of the United States before peace was formally and officially announced by the Government.

In *Planters' Bank* vs. *Union Bank*, 16 Wall., 495, speaking of the situation in New Orleans while held by Union troops, the court says:

"*Still, as the war had not ceased*, though it was not flagrant in the district, as General Banks was in command of the district, it *must be conceded that he had power to do all that the laws of war permitted*, except so far as he was restrained by the pledged faith of the Government, or by the effect of Congressional legislation."

And this court held, in that case, that by reason of the proclamation of General Butler, issued on the 6th of May, 1862, private property in the City of New Orleans was exempt from seizure, unless seized under the laws of war for the use of the army; and that inasmuch as the seizure involved in that case was not made for any such purpose, it was illegal.

Second. THE LIMITATION CONTAINED IN THAT ACT WAS SUSPENDED DURING THE PERIOD OF TIME EMBRACED BY THE LATE REBELLION.

It is a general and well-established rule in the construction of statutes of limitation, in courts of equity, as well as in courts of law, *that a cause of action or suit arises when, and as soon as the party has a right to apply to the proper tribunals for relief.*

Angel on Limitations, p. 37, chap. 6, sect. 42;
2 Story's Eq. Jurisp., sect. 1521*a*.

This court declared in the case of Mrs. Alexander's cotton—above quoted—that she being a resident in enemy territory, *and in law an enemy*, could have no standing in any court of the United States so long as that relation continued to exist.

That being the settled law of this court it is important to determine when the disability resulting from such residence ceased to exist, and when the right of the appellants' to institute their suit in the Court of Claims revived.

It is also settled by the repeated decisions of this court that in computing the time of the running of statutes of limitations, the time during which a party is absolutely precluded from prosecuting his suit, must be deducted from the period fixed by the statute. Mr. Justice CLIFFORD, speaking for this court, in the case of *Hanger* vs. *Abbott*, 6 Wall., 532, examines in great detail and with

the research which characterizes all his opinions, the philosophy of statutes of limitation, and declares that the above proposition is clearly established by the principles of the public law, as well as by the adjudged cases where that question was considered and decided.

This court, in the case of the PROTECTOR, 12 Wall., 700, decided that *the period of recognized war*, which must be deducted from the period fixing the limitation to the commencement of an action, was that which the Executive Department of the Government had declared, and that was from April 19th, 1861, to April 2, 1866.

To the same effect also are the following cases:

Brown vs. *Hiatts*, 15 Wall., 177;
Levy vs. *Stewart*, 11 Wall., 244, 249, 253, 255;
Semmes vs. *The Hartford Ins. Co.*, 13 Wall., 160;
Kaufman vs. *Batesville Institute*, 18 Wall., 151, 155.

The Court of Claims, in the case of *Scirra* vs. *The United States*, 9 N. & H., 225, 230, recognized the principles of the above cited cases as applicable to suits against the United States pending in that court, and stated their conclusions upon that question as follows:

"First. That during the period that the State of Florida was engaged in rebellion against the United States—that is to say, from April 19, 1861, to April 2, 1866—the limitation prescribed in the tenth section of the act of March 3, 1863, amendatory of the act establishing the Court of Claims, did not run against the claim herein sued on.

"Second. That said limitation began to run against said claim on the 2d day of April, 1866, when, by the proclamation of the President of the United States of that date, the rebellion, so far as the State of Florida was concerned, was at an end."

The argument by which the court reached these conclusions is stated by the learned Chief Justice as follows:

"The cases in which it has been held that the period of the rebellion is to be excluded from the computation of the time fixed by statutes of limitation for the bringing of suits, though arising between individuals, and principally under State laws, were settled upon grounds which seem to apply equally to the case of a claim against the United States, in favor of an inhabitant of an insurrectionary State, during that period, whether he was in act and fact a rebel, or was loyal to the Government, but constrained by circumstances to abide in the territory occupied by the rebel authorities and people. *Regarded either way, he was excluded from suing in this court during that period.*

"If, then, the limitation prescribed by the act of March 3, 1864, was suspended during the period of the rebellion, the next point to be determined is the date at which it became operative as against this claim. This was settled by the Supreme Court in the case of *The Protector* (12 Wallace, 700), where it was held that the date of the proclamation of April 2, 1866, was the close of the war in the States therein mentioned, of which Florida was one. Hence we assign to that date the beginning of the operation of the statute."

These authorities are conclusive upon this question. No argument could add force to the simple statement of the proposition that "the right to sue, suspended by the existence of war, revives when peace is restored." It must necessarily result, therefore, that the time during which the Court of Claims was closed to the citizens of States in rebellion is to be excluded, in suits since brought, from the computation of the time fixed by the statute of limitations within which suits may be brought, *although no such exception is expressly admitted in the statute prescribing the limitation.* Both the limitation and the disability are alike imposed by law, and, as this court declare in the case of *Semmes* vs. *Hartford*

Insurance Company, "it is nothing, therefore, but a necessary legal logic that the one period should be taken from the other."

The application of these principles to the case under consideration must inevitably lead to the conclusion that the issue presented by the appellants' replication to the defendant's third plea should be found in favor of the appellants, and this court must declare that the suit of the appellants, was instituted in the Court of Claims, *within six years after the claim first accrued and became cognizable in that court.*

In conclusion, we re-state in the simplest form the propositions which we have presented for the determination of the court.

1st. That the appellants' cause of action is upon an *implied contract* with the United States, resulting from the *un-authorized seizure* of the property of the appellants', by a special agent of the United States, and the subsequent sale of such property by another special agent, and the payment of the proceeds resulting from such sale, into the Treasury of the United States.

2nd. That the appellants' suit was instituted in the Court of Claims, within six years after the cause of action stated in their petition, became cognizable by that court.

The principles by which the above propositions are to determined are neither uncertain nor doubtful. The same legal principles which would be applied to the facts in this case, were this suit between individuals, and pending in the appropriate tribunal, must be applied to the determination of the questions involved here. The principles which determine the legal liability of the United States in actions upon contracts, express or implied, are simply and only those, which would be applied

to suits between individuals, upon similar contracts, in the ordinary tribunals of justice. This is the settled policy and rule of this court, declared in the following cases:

United States vs. *Speed*, 8 Wall., 77, 84;
Gibbons vs. *The United States*, 8 Wall., 272;
Smoot's case, 15 Wall., 45;
Amoskeag Company, 17 same, 592;
United States vs. *Smith*, 94 U. S. R., 217.

If this court shall apply to the case at bar the principles of the above cited cases, then the judgment of the Court of Claims, must be reversed, and this cause remanded to that court, with directions to enter a judgment in favor of the appellants', for the sum of one hundred and twenty-seven thousand three hundred and fifty dollars ($127,350.00).

JOHN J. WEED,
Attorney for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1878.

No. 111.

J. S. CLARK et al., Appellants,

vs.

THE UNITED STATES.

BRIEF FOR APPELLANTS.

MATT H. CARPENTER,
Of Counsel.

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1878. No. 111.

JOHN S. CLARK ET AL., APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

This is an appeal from a judgment of the Court of Claims, dismissing the claimant's petition by an equal division of opinion among the judges.

THE CASE

is briefly this: The complainants sought to recover the net proceeds of 900 bales of cotton, on the facts found by the Court of Claims, as follows:

"That in July and August, 1865, the petitioners, James S. Clark and Edward Fulton, were merchants and co-partners doing business at New Orleans under the firm and style of J. S. Clark & Co., and Joseph C. Palmer was a merchant at Mobile.

"That in the said July and August the petitioners were the owners jointly of 900 bales of cotton, which arrived at Mobile in the last part of said July or the first part of said August, consigned by them to T. C. A. Dexter, supervising and special agent of the Treasury Department for the department of Alabama. At the time above stated the government had charge of the railroads, and the cotton was consigned to Mr. Dexter to facilitate its arrival at Mobile;

and on its arrival there, it was claimed of him by the petitioners. In August, 1865, Mr. Dexter having received orders from the Treasury Department to ship all cotton received by him, shipped the said 900 bales to New York, where it arrived and was sold by the United States, and the net proceeds thereof, amounting to the sum of $127,350, were paid into the Treasury.

"The said Clark and Fulton resided in New Orleans, and said Palmer in Mobile, during the whole rebellion, and this petition was filed March 27, 1872."

Assignment of Error.

The Court of Claims erred in dismissing the petition on the facts found.

Points.

I.

As between individuals, it is well settled, that *where the defendant has realized money* from the wrongful conversion of the plaintiff's property by himself or his agents, the plaintiff may waive the tort and sue in assumpsit, as upon an *implied contract*, for the amount of money so received.

Chitty on Contracts, 11th American edition, volume 1, page 84, says:

"There are likewise cases in which the law raises a promise even from the wrongful acts of a party, and in which the courts will not admit evidence of his intention to commit a *tort*, in order to negative such implied promise; for no man can set up or take advantage of his own wrong. * * * * An action (*assumpsit*) lies to recover the value of goods as sold to the defendant, if he by fraud induces the plaintiff to sell them to an insolvent person, and afterwards obtain them for his own benefit."

Hill *v.* Perrott, 3 Taunt., 274.

Abbott *v.* Barry, 5 Moore, 98.

Ed. Meads *v.* Newman, 1 B. and C., 48.

And again, 2 vol., p. 905:

"There are also many cases in which the plaintiff may waive a *tort* committed by the defendant, and through the medium of which he has received money belonging to the plaintiff, and sue as for money had and received; as, where the defendant tortiously takes and receives the plaintiff's money, *or takes his goods and sells them* and *receives the proceeds.*"

Lamaine *v.* Dorell, 2 Ld. Raym., 1216.
Foster *v.* Stewart, 3 M. and S., 191.
Young *v.* Marshall, 8 Bing., 43.

And generally it may be asserted that where the defendant has received money which in equity and good conscience belongs to the plaintiff, the action of *assumpsit*, as for money had and received, will lie.

Per Tyndall, C. J., Smith *v.* Jones, 6 Juris., 583.
Per Lord Mansfield, Moses *v.* Macferlin, 2 Bur., 1,005.
Eddy *v.* Smith, 13 Wend., 588.
Wright *v.* Burler, 6 Wend., 200.
Irvine *v.* Hanlon, 10 Serg. and R., 219.
Rogart *v.* Novins, 6 Serg. and R., 369.
Murphy *v.* Barron, 1 H. and Gill, 258.
Guthrie *v.* Hyatt, 1 Harring., 447.
Tevis *v.* Brown, 3 J. J. Marsh, 175.
Martzell *v.* Stauffer, 3 Penn., 398.
Allen *v.* McKeon, 15 Sumner, 317.
Glass *v.* Lobdell, Walker, (Miss.,) 105.
Hatton *v.* Robinson, 4 Blackf., 480.
Rathbone *v.* Stocking, 2 Barb., 135.
Wilson *v.* Sargent, 12 Ala., 778.
Buell *v.* Boughton, 2 Denio, 591.
Knapp *v.* Hobbs, 50 N. H., 478.

II.

The same principle applies to the government that obtains between individuals.

United States v. *State Bank*, 6 Otto, 30.

III.

The Court of Claims has jurisdiction in all cases founded upon contract express or *implied*. In other words, the government has consented to be sued in the Court of Claims upon any state of facts which would enable the plaintiff to maintain *assumpsit* on *implied contract* against an individual.

IV.

The refusal of the agent Dexter to deliver to the petitioners their cotton on their demand, his shipping the same to the government agent in New York, and the sale of the cotton by the New York agent, were tortious acts; and the proceeds of the sale being in the Treasury, the petitioners are entitled to recover in this suit.

V.

THE FOREGOING PROPOSITIONS ARE CONCLUSIVE OF THIS CASE, if they can be maintained; and there is no doubt of their soundness, unless the fact that the property was converted in a State which had been in insurrection changes the case.

THE ARGUMENT AGAINST US IS, that the case falls within the "Captured and Abandoned Property Act" of March 12, 1863, and the acts amendatory thereof;

12 Statutes, 820;
13 Statutes, 375;
15 Statutes, 243;

and therefore suit could only be brought within two years after the suppression of the rebellion.

The act of March 12, 1863, (12 Stat., 820,) provided for the preservation of captured and abandoned property owned by citizens in the South who had not aided the rebellion. The act provided for the appointment of special agents to collect this property in insurrectionary States, and that the same should be sold, and the proceeds thereof be paid into the Treasury; such proceeds to be recovered by loyal owners by suits in the Court of Claims, to be commenced within two years after the suppression of the rebellion.

There is no pretense that this property was captured, and it does not fall within the definition of abandoned property contained in the act of July 2, 1864, (13 Stat., p. 576,) as follows:

"Property, real or personal, shall be regarded as abandoned when the lawful owner thereof shall be voluntarily absent therefrom, *and engaged, either in arms or otherwise, in aiding or encouraging the rebellion.*"

By the act of July 27, 1868, (15 Stat., 243,) it was declared to be the true intent and meaning of the act of March 12, 1863, "that the remedy given in cases of seizures made under said act, by preferring claim in the Court of Claims, should be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said act from suit at common law," &c.

Of course, the principle that where a statute gives a new right, not existing at the common law, and prescribes a particular remedy for its enforcement, the remedy prescribed is *exclusive*, is freely admitted. But we contend this case does not fall within the statutes above referred to, and therefore this principle does not apply to this case. These statutes applied only to property—

(1) Captured; that is, taken by the naval or military

forces of the Union in the prosecution of warlike operations; or,

(2) Abandoned; that is, property the owners of which were voluntarily absent therefrom, *and engaged*, either in arms or otherwise, *in aiding or encouraging the rebellion.*

The property in question fell within neither of these classes. Therefore these statutes have nothing to do with the matter in hand.

Again, the Treasury Department issued orders to its agents on the 27th June, 1865, to cease operations under the act of March 12, 1863. After this, the act ceased to have any practical operation; and the whole machinery of the act and its amendments fell as completely as though the acts had been repealed on that day, except as to suits commenced against the agents for acts done under color of the statutes.

Therefore this action is to be determined as though the acts had never been passed; or, in other words, as though the same facts had occurred in any State of the Union one year ago.

Suppose the postmaster at Milwaukee should seize my property to-day and send it to the postmaster of New York, who should sell it and pay the proceeds into the Treasury, could I maintain assumpsit on implied contract for the avails in the Treasury? If so, this action can be maintained.

MATT H. CARPENTER,
Of Counsel for Appellant.

June 29. 79 R. & M'Ks

Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

No. 111.

CLARK & FULTON, Appellants,

vs.

THE UNITED STATES.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

JOHN J. WEED,
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Supreme Court of the United States.

OCTOBER TERM, A. D. 1878.

CLARK & FULTON, *Appellants*,
vs.
THE UNITED STATES. } No. 111.

Supplemental Brief for Appellants.

In the oral arguments of this case, the attention of appellants' counsel was directed by Mr. Justice Strong to the peculiar provisions of the statute of limitations, relating to the prosecution of suits in the Court of Claims. The language of that statute is as follows:

"That every claim against the United States COGNIZABLE "by the Court of Claims shall be forever barred unless the "petition setting forth a statement of the claim be filed in "the court or transmitted to it, under the provisions of this "act, within six years after the claim first accrues."

The exceptions in this statute saving the rights of persons under disabilities is in the following words:

"That the claims of married women first accrued during "marriage, of persons under the age of twenty-one years, "first accruing during minority, and of idiots, lunatics, insane "persons, *and persons beyond seas*, at the time the claim "accrued, entitled to the claim, shall not be barred, if the "petition be filed in the court, or transmitted as aforesaid, "within three years after the disability has closed. BUT NO "OTHER DISABILITY THAN THOSE ENUMERATED SHALL PREVENT "ANY CLAIM FROM BEING BARRED."

12 Stats at Large, 767.

I.

The question which this provision of that statute suggests for consideration, is, whether this court is precluded by its peculiar provisions, from considering or admitting in favor of the appellants the exception, or disability resulting from the residence of the appellants in the city of New Orleans during the late rebellion.

The *disability* to maintain a suit by one who is legally classed as a public enemy, is an exception admitted into statutes of limitation independent of, and without any aid or authority from such statutes. It is the *vis major* which war creates, and is more potent than statutes or constitutional provisions. It results from that long established principle of international law, which *in time of* war effectually closes the courts, of those who are enemies of each other, and excludes them from any right to maintain any action in the courts of either.

No language can add to the force with which Mr. Justice Clifford, has characterized the unyielding power of exclusion, resulting from this cause. In *Hanger* vs. *Abbott*, 6 Wall., p. 539, the legal incidents of the existence of war upon the right to sue, is thus described:

"Total inability to sue on the part of an enemy creditors, "to sustain any contract in the tribunals of the other belligerent exists during war, but the restoration of peace opens "the doors of the courts. Absolute *suspension* of the right, and "*prohibition* to exercise it exist during war, *by the law of nations*, "*and if so then it is clear* that peace cannot bring with it the "remedy, unless it also be held that the operation of the "statute of limitations is also suspended during the period "the creditor is *prohibited*, BY THE EXISTENCE OF THE WAR AND "THE LAW OF NATIONS *from enforcing his claim*. Neither *laches* "nor fraud can be imputed in such a case, and none of the "reasons on which the statute is founded, can possibly apply, "*as the disability to sue becomes* ABSOLUTE BY THE DECLARATION "OF WAR AND IS A CONCLUSION OF LAW."

The unanswerable logic of these propositions is so obvious, that a denial of them would result in the assertion of

the legal absurdity of declaring that, while the right to invoke the jurisdiction of the Court of Claims, was *denied* to the appellants, while they were in law, public enemies of the Government, they are to be adjudged guilty of laches for not doing that which the law forbade them to do.

This court in the case of Mrs. Alexander's cotton, 2 Wall. 419, declared what would be the legal effect of a residence in enemies' territory, upon the legal right of such a resident, to bring a suit *in any court of the* United States, while that relation existed, in the following language:

"It is said that though remaining in rebel territory, Mrs. "Alexander had no personal sympathy with the rebel cause, "and that her property therefore cannot be regarded as ene- "my's property. But this court cannot inquire into the per- "sonal character and disposition of individual inhabitants of "enemy territory. We must be governed by the principle "of public law, so often announced from this bench as ap- "plicable alike to civil and international wars, that all the "people of each State or district in insurrection against the "United States must be regarded as enemies *until by the ac- "tion of the legislature and the executive, or otherwise, that rela- "tion is thoroughly and permanently changed.*"

And again at page 421 the court says:

"*Mrs. Alexander being now a resident in enemy territory, and "in law an enemy, can have no standing in any court of the United "States so long as that relation shall exist.*"

This was not a case under the "abandoned or captured property act," but the question involved was whether cotton captured on land was lawful *maratime* prize, subject to the prize jurisdiction of the courts of the United States; and it was held that the prize jurisdiction did not attach, and this court dismissed the libel, and declared that the money derived from the sale of the cotton ought to be paid into the Treasury, in order that Mrs. Alexander might recover it if she could show herself entitled to it after the rebellion had been suppressed, and her right to sue for it had been restored by the return of peace.

Mr. Justice Miller, in the case of Semmes, *vs.* The Hartford Insurance Co., recognized the absolute necessity of so

construing statutes of limitations, as to give practical effect to the legal consequence of the existence of war, as declared by the law of nations.

And Mr. Justice Field, in the case of Brown *vs.* Hyatts, 15 Wall., 184, declared that "statutes of limitation, in fixing a "period of time within which rights of action must be as-"serted, proceed upon the principle that the courts of the "country where the person to be prosecuted resides or the "property to be reached is situated, *are opened during the pre-"scribed period to the suitor. The principle of public law which "closes the courts of a country to a suitor renders compliance by him "with such a statute impossible.*"

II.

Such a construction of this statute as would have authorized the appellants to maintain their suit in the Court of Claims during the rebellion would have been in plain violation of the principles of the law of nations, *and a denial to them now of the rights* which were suspended by the existence of war would be equally in violation of the law of nations.

It is declared by Attorney General Randolph (1 Opinions of Attorneys General, 27,) that the laws of nations, although not specially adopted by the Constitution or any municipal act, is essentially a part of the law of the land.

In the Nereide, 9 Cranch, 388, it was declared that this court was bound by the law of nations, which is part of the law of the land.

And it is also a familiar principle declared by this court that laws of the United States ought not to be so construed as to infract the common principles and usages of the law of nations.

Talbot *vs.* Seeman, 1 Cranch, 1.

Murry *vs.* The Charming Betsy, 2 Cranch, 118.

Mr. Webster, speaking of the universal potency of the law of nations, said:

"This public law is not one thing at Rome, another at "London, and a third at Washington. It is the same in all

"civilized States, everywhere speaking with the same voice "and the same authority."

A single illustration will demonstrate the force of this principle. Suppose the appellants, before the breaking out of the rebellion, had brought their suit in the Court of Claims, upon an *implied contract*, for money wrongfully received by the United States through the instrumentality of one of its agents, and such suit had been pending in that court at the time when the President proclaimed the existence of the rebellion. Would not such suit have been abated, or at least suspended, during the rebellion, upon it being shown to the court, that the appellants were residents in a State in rebellion, although their continued loyalty to the Union had been conceded; and if suit upon the same cause of action had been instituted *subsequent* to the passage of the 10th section of the act of March 3d, 1863—the act under consideration—and the same state of facts had been shown to exist, would not the same result inevitably have followed?

It is submitted, therefore, that Congress did not intend by this statute to punish any of its loyal citizens for not doing that which the law did not permit them to do, and that this statute should receive such a construction as will avoid that result.

III.

Although commercial intercourse by residents of the loyal States with the city of New Orleans was restored by its recapture by the Union forces, still that intercourse was not unrestricted and free, but at all times subject to military and civil control. Intercourse with that city was *authorized*, but it could only be carried on under regulations prescribed by the Secretary of the Treasury. The firm grasp of military authority was never relinquished or withdrawn until the last remnant of the Confederate military power was overthrown. It was at all times subsequent to its recapture held and controlled by the military and naval power of the

United States, and held as enemy's territory, and that power and authority was supreme. Residence in New Orleans, subsequent to its recapture did not make the residents there any the less enemies or any the less subject to the military authority, if it became necessary to use that authority for the purposes of safety and peace, any more than such a residence in Nashville, Tennessee, subsequent to its recapture and permanent occupancy by the United States forces, converted a resident of Nashville from a public enemy to a loyal citizen. The war was prosecuted by State lines, and the impress of public enemy was stamped alike upon residents of Louisiana and Tennessee.

Hamilton *vs.* Dillin, 21 Wall., 73, 94.

Such occupancy of States, or parts of States, as this court declared in the case of the Venice, 2 Wall., 277, "*did not* "*indeed, restore* peace, or, in all respects, former relations; but "it replaced rebel by national authority, and recognized, *to* "*some extent*, the conditions and the responsibilities of national "citizenship."

The places thus captured and held by the military power of the United States were, by this means, only brought under the special licensing power of the President, conferred by the act of July 13, 1861.

The Venice, 2 Wall., 278.

Again, Congress, by the 9th section of an act approved July 2d, 1864, (13 Stats. at Large, p. 377,) withdrew from the President the power to authorize even this limited and restricted intercourse between the rebel and loyal States. This act applied as well to those portions of the rebel States which were held in permanent occupation by the military forces of the Union as those which were not; and this act continued in force, until peace was restored between the United States and the State of Louisiana in April, 1866.

Again, the principle should never be lost sight of, that a belligerent may authorize qualified or unqualified commercial intercourse with the enemy. This is always matter of policy to be determined by the belligerent.

Hence it follows that merely terminating restrictions upon commercial intercourse does not relieve the enemy of his hostile character, nor restore him to the rights of peace.

The residents of such a State were still subject to the laws of war, and were not, in any respect, controlled by the laws of peace or the civil authorities.

Planter's Bank *vs.* Union Bank, 16 Wall., 495.

IV.

But it is submitted that this question is concluded by the repeated decisions of this court, in cases where it has received most careful consideration.

Commencing with the case of Anderson *vs.* The United States, 9 Wallace, p. 64, this court was called upon to determine the exact period of time, when the rebellion was suppressed in order to determine at what time a loyal citizen, whose claim was embraced by the abandoned or captured property act, had a right to commence his suit, for he had only "*two years after the suppression of the rebellion*," in which to avail himself of the remedy provided by that act, AND WHILE THE REBELLION CONTINUED HE REMAINED AN ENEMY.

This court, in an elaborate opinion, declared that, inasmuch as both the Executive Department of the Government, *and* Congress had concurred in fixing the 20th day of August, 1866, as the day on which the rebellion closed, it would fix that day as the commencement of the running of the limitation prescribed by that act.

In reaching this conclusion Mr. Justice Davis used the following language:

"As Congress, in its legislation for the army, has deter-
"mined that the rebellion closed on the 20th day of August,
"1866, there is no reason why its declaration on that subject
"should not be received AS SETTLING THE QUESTION WHEREVER
"PRIVATE RIGHTS ARE AFFECTED BY IT."

9 Wallace, 71.

That case, like the one under consideration, was a con-

troversy to which the United States was a party, and involved the construction of a *remedial* statute. It was also a statute of *limitations*, for the remedy, could not be made effective unless rights under it were asserted within a given time.

Is there, or can there, therefore, be any good reason for assigning a different time for the commencement of the running of the limitation prescribed by the above cited statute? In both cases "*private rights*" are affected, the rights of the United States are involved, and in construing the statute in which this exception is contained it is to be borne in mind that the court is also construing a *remedial* statute.

But if the court is not disposed to agree to this, then it must adopt the other conclusion: that, as to the State of Louisiana, peace was only restored so as to confer the right to sue the United States, on the 2d day of April, 1866.

Adger *vs.* Alston, 15 Wallace, 555.

This was a writ of error from the Circuit Court for the district of Louisiana.

Levy *vs.* Stewart, 11 Wall., 244, 249, 253.

This was also, a writ of error from the Circuit Court for the district of Louisiana, and the same principle was declared, although it was admitted that the United States Circuit Court was re-organized in that State in June, 1863.

V.

There is, however, still another answer to the assumption that the appellants' suit in the Court of Claims was not instituted "*within six years after the claim first accrued.*" This statute declares that, "all claims *cognizable* by that court shall be forever barred," unless, suit therefor shall be instituted within that period. The Attorney General insists that the appellants cotton came to the possession of the officer who sent it forward for sale, because he was an agent appointed under the "abandoned and captured property act," and that he received it in *that* capacity, and no other.

It is insisted also that, even if the agent was mistaken, in regard to the character of this property, and that it was not in fact, either abandoned or captured, and its conversion by the Treasury agent to the use of the United States was *unlawful*, still, the appellants remedy was exclusively under that act. If the cotton were neither abandoned or captured, the remedy was not under that Statute, but under the general act organizing the Court of Claims. If the act of the agent in the seizure of the cotton was unlawful, it necessarily follows that no *implied contract*, could result from such act, against the United States. A claim founded upon such unlawful act would not be "COGNIZABLE" by the Court of Claims, unless the United States had, in some way, either *expressly* or *impliedly*, ratified or accepted the acts of its agents. When *that* is done, a claim which rests upon the wrongful or illegal acts of a public agent FIRST ACCRUES against the United States, and becomes "COGNIZABLE" by the Court of Claims.

This court, in Gibbons *vs.* The United States, 8 Wall., 272, declared that Congress alone had authority to ratify the illegal acts of its public agents.

If that is true, then it required a declaration by Congress of the acceptance by the United States of the illegal acts of its agent before any suit, growing out of such illegal acts, could be instituted in the Court of Claims, as forming the basis of an *implied contract*.

That express declaration by Congress, of its purpose to accept the illegal acts of its Treasury agents in administering any of the laws relating to abandoned or captured property, is to be found in the act approved July 27, 1868, (15 Stat. at Large, pp. 243, 244.)

The effect and the legal result of the passage of that act was the complete and absolute protection of the public agent from the consequences of his illegal acts, and the acceptance by the Government of all liability for such acts. Where there is such ratification by the Government the liability of the agent ceases; for in such a case there is never any

double liability, and the very instant the agent is released the Government becomes exclusively liable.

This is clear, upon the authority of the case of Buron *cs.* Denman, 2 Exchequr. Rep., 188–'9, where, after holding that there was a subsequent adoption and ratification by the Queen's Government of the unauthorized and illegal acts of Commander Denman, the question arose whether it was like the case of individual principals and agents, where a subsequent ratification and adoption of the act gave the aggrieved party a remedy against either or both—the principal and agent. But the court clearly holds that the act of the Crown absolves the officer, and left it alone responsible. Lord C. B. Parke says :

"If an individual ratifies an act done in his behalf, the "nature of the act remains unchanged. It is still a mere "trespass, and the party injured has his option to sue either. "If the Crown ratifies an act, the character of the act be- "comes altered, for the ratification does not give the party "injured the double option of bringing his action against "the agent who committed the trespass, or the principal who "ratified it, but a remedy against the Crown only, (such as "it is,) and actually exempts from all liability the person "who commits the trespass."

The conclusion to be drawn from this authority is, that *as soon as* a Government has ratified the illegal acts of its agents, the liability of the Government begins, AND A RIGHT OF ACTION, THEN FOR THE FIRST TIME ACCRUES AGAINST THE RATIFYING GOVERNMENT. This must inevitably be true, and the limitation prescribed for commencing a suit resulting from such ratification must begin with the assumption of liability by the Government, for where no right of action has existed there can be no operation of a statute of limitations, because the very elements upon which such limitation is founded are wanting in such cases.

Therefore, upon the assumptions of the Attorney-General, this suit may be maintained, and is not barred by the statute of limitations to which our attention was directed, because it was instituted within six years after the illegal act of the

agent was adopted by the Government, by the act of July 27, 1868, when for the first, the claim accrued against the United States, and became "COGNIZABLE" by the Court of Claims.

To recapitulate, we submit:

(1.) That commercial intercourse is no test of the existence or non-existence of enemy character.

(2.) That although New Orleans was held in continuous military occupation by the United States, and partial commercial intercourse at times permitted, yet every citizen of Louisiana was, in law, a public enemy until the restoration of peace in April, 1866.

(3.) That until the restoration of peace no citizen of that State could have standing in a court of the Union to prosecute a claim against the United States.

(4.) That to suppose Congress by the act in question, intended to impute *laches* in respect to the omission of an act forbidden by law would be to disgrace Congress, by imputing to it an intention to violate the law of nations and the principles of natural justice.

(5.) That if the appellants' right to recover in this action depends upon the ratification of the illegal acts of the Treasury agent by Congress, and their claim only accrued and became cognizable from the date of such ratification, then their suit was instituted in the Court of Claims within six years from that date, because such ratification by Congress must be held to have taken place with the passage of the act of July 27th, 1868.

JOHN J. WEED,
Attorney for Appellants.

MATT. H. CARPENTER,
Of Counsel.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

CLARK & FULTON
v.
UNITED STATES. } No. 111.

APPEAL FROM COURT OF CLAIMS.

APPELLEES' BRIEF.

In the Supreme Court of the United States.

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v.
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APPEAL FROM COURT OF CLAIMS.

APPELLEES' BRIEF.

STATEMENT.

In July and August, 1865, Messrs. Clark & Fulton, merchants at New Orleans, to facilitate the transportation to Mobile over the railroads in government possession of 900 bales of cotton belonging to them, consigned it to T. C. A. Dexter, special agent of the United States Treasury at the latter city. The petitioners claimed it of Mr. Dexter after it reached Mobile, but he, in pursuance of orders to ship *all* cotton received by him, shipped these 900 bales to New York, where they were sold by the United States, and the proceeds ($127,350) were paid into the Treasury. During the whole of the rebellion Clark & Fulton resided at New Orleans.

This petition was not filed until March 27, 1872—nearly six years after the *entire* close of the war, and more than six years after the claim accrued.

BRIEF.

I.

But for the confidence with which the contrary theory is maintained by the appellants, I should have assumed it to be incontestable that the only right to the proceeds of this cotton was such as was conferred by the abandoned and captured property act of March 12, 1863 (12 Stats., 820).

It was received by Mr. Dexter as special agent of the United States, and only in that capacity. It was sent to and taken by him solely because of his official position. Once in his custody, he could do no otherwise than he did with it. By referring to the pamphlet mentioned by appellants, on pp. 58, 87, 88, and 115, it will be seen that not only captures but property "voluntarily abandoned by them [its owners] to the *civil* or military authorities of the United States" was to be strictly accounted for; and the agents were expressly prohibited from releasing it to any person claiming ownership (*Ib.*, pp. 60, 87, 115, ¶ xiii). This last regulation commences thus: "No property collected or received *as* captured, abandoned, or confiscable under any act of Congress shall be released by any agent except by special authority from the Secretary of the Treasury to any person claiming ownership of such property; nor shall any permit be given by such agents to individuals to remove such property." In August, 1865, Mr. Dexter is specially instructed to send this particular cotton to Mr. Draper, to be sold in New York.

Certainly this order, directly to him, is at least *as* authoritative as a general printed circular sent to the various special agents throughout the country.

In view of the continued existence of war in Alabama the right also co-existed to treat this cotton as lawful *capture*, precisely as it had been treated for the preceding years.

I. It is the unquestionable law of nations that, in the absence of all prohibition on the part of the sovereign or state, any "individual" subject or citizen of the sovereign or state at war with another has the right, nay, it is his *duty*, to secure for the use of his sovereign any and all property that may fall into his hands belonging to an *enemy*. This is all Dexter did; he *ought* not to have done less.

Vattel's Law of Nations, book iii, chap. xv, page 400. (Chitty's ed.)

Thompson's Law of War, chap. 1, sec. i, pages 35 and 36.

Story, J., in Brown *v.* United States, 8 Cranch, 130–35, and authorities there cited.*

(1.) No prohibition on the part of the United States rested on Dexter forbidding him to do what he did. Section 4 of circular-letter of the Treasury Department, June 27, 1865, referred to by claimants throughout their brief, has no application to the subject.

* This is a *dissenting* opinion, but *not* upon the point here discussed. It is cited as authority by the claimants. (Brief of claimants, page 22.) It is declared by Phillimore to be "exhaustive of the argument and learning on the subject." (Phillimore's International Law, vol. iii, chap. vii, part ix, sec. xcii, pp. 150, 152, Second English ed.)

II. If, instead of merely securing property for the use of his sovereign or state, the individual subject or citizen arms himself and wrests by force property from an enemy, *he violates no rule of international law*, or does any act of which *the enemy can complain*. It is only *his* sovereign or state that can complain of it. If any offense has been committed or any wrong done by the perpetration of the act, it is an offense or wrong against *his* sovereign or state; and *that* is determined by *his* sovereign or state *adopting* or *repudiating* his act. *Ratifying the act validates it from the beginning.*

(1.) And this whether there existed at the time of his committing the act *prohibition* or not.

(2.) And whether it occurred on *land* or *sea*.

Vattel's International Law, book iii, chap. xv, page 399. (Chitty's ed.)

Phillimore's International Law, vol. iii, part x, chap. vii, sec. xcii, pp. 150, 51. (Second English ed.)

Ibid., chap. iv, part x, sec. ccxlv, page 559.

Ibid., part ix, chap. vi, sec. lxvii, pp. 114–15.

"The neutrality of Great Britain," &c. (Prof. Montague Bernard), chap. iv, page 95.

Kent's International Law, page 248. (Abdy's ed.)

Ibid., Commentaries, vol. i, *95, 96. (12th ed.)

Story, J., in Brown *v.* United States, 8 Cranch, 130, 135, and authorities there cited.

Story, J., in the Nereide, 9 Cranch, 449, and authorities there cited.*

* This, too, is a *dissenting* opinion, but not on this point. It is cited as authority by claimants. (Brief of claimants, page 23, top.)

The Dos Hermanos, 2 Wheaton, 76, 99.
Ibid., 10 Wheaton, 306–10.
The Amiable Isabella, 6 Wheaton, 1, 66.
Thorshaven, Edwards, 102, 108, 109.
The Caledonian, 4 Wheaton, 103.

III. That the *United States* has ratified the act of Dexter is apparent from the facts found by the court. It was ratified when, in New York, as *the court has found*, the cotton was *sold* BY THE UNITED STATES. If it were *not* apparent, we would refer to claimants' brief, where the same is strenuously insisted on and made fully to appear, in order that the aid of an "implied contract" may be invoked. "Ratification" BY *the* "*United States*" is the corner-stone of claimants' argument.

(1.) That the *United States*, as a sovereign, had the abstract right to seize this cotton, or authorize any individual to seize it, is admitted by claimants (Claimants' brief, statement of second point, p. 17), and it will not be denied that what it could lawfully do or authorize to be done, it could lawfully ratify.

IV. But the question of ratification of unauthorized acts does not properly arise. The facts found by the court show that Dexter was an *agent* of the Treasury Department, and shipped the cotton under special *orders* issued to him from that department. No act of seizure was performed by Dexter unless it was in shipping to New York this property voluntarily placed in his hands. This he did, "having received orders from the Treasury Department to ship *all* cotton received by him." It is therefore a

contradiction in terms to speak of the ratification of that which, in the very first instance, was *ordered*. That the Treasury Department had as much right to seize this cotton, or to order its officers to seize it, as had the Army or Navy, is not to be disputed.

See Green *v.* The United States, 10 Ct. of Claims Reports, 473, 474.

And that the Army and Navy had the right to capture it cannot be denied.

V. I have thus far assumed the situation to have been what I admit it must have been to justify the seizure of this property, whether by a mere individual citizen of the State, or an authorized agent, or a commissioned captor. To justify this act in July and August, 1865, the United States must have been at *war* with the State where this cotton was. This property must have been *hostile* property. In this brief I shall continue to assume this.

II.

This action is barred by the general statute of limitations.

If the claimants ever had a right of action against the United States they cannot now maintain it, for more than *six* years have elapsed since their right of action accrued, and they are therefore barred by Revised Statutes, c. 21, § 1069.

(1.) If this court think that, notwithstanding the prohibitory terms of this statute, "other disabilities than those enumerated" in it "shall prevent any claim from being barred," and of these *war* is one, still it

is not war, *as* war *merely*, that does it. The circumstances must be such, the surroundings and conditions of that nature and character, as will show that the parties claiming the disability did not *themselves create it.*

Mrs. Alexander's Cotton, 2 Wallace, 421.
Ludlow *v.* Ramsay, 11 Wallace, 589.
Haycraft *v.* The United States, 8 Ct. of Claims, 485, 86.

(*a*) By *voluntarily* remaining in New Orleans, the claimants in this case *created* whatever disability existed to their bringing suit in this court *the very next day after their right of action accrued* (August, 1865). Not one of them was "*constrained to abide*" in this city at or after the time of the seizure of this property ('65).

(2.) Nothing can be more erroneous than to say, as do counsel for claimants, that *war* of *itself*—independent of all circumstances—suspends the operation of the statute of limitations, by taking from an enemy, domestic or *alien*, all right of standing in court.

2 Kent's Com., 64.
Clark *v.* Morey, 10 Johns., 68.
McVeigh *v.* The United States, 11 Wallace, 267–68.
Ludlow *v.* Ramsay, 11 Wallace, 589.
United States *v.* 1,756 shares of capital-stock, 5 Blatchford, C. C. Rep., per Nelson, J., 231–237.

(3.) The case of Hanger *vs.* Abbott (6 Wallace, 532) is rightfully *decided* on the *facts* as therein stated. For a later statement of the law, see McVeigh *v.* The United States, 11 Wallace, 267–68, and Ludlow *v.* Ramsay, Id., 589.

But if this property *was* "seized," as claimants earnestly insist, then it was *captured*. It was captured (seized) and sold, and the proceeds paid into the Treasury under the act of March 12, 1863 (12 Statutes, 820), the same as if it had been taken by the Army or Navy. And not having brought their action within *two* years from the suppression of the rebellion (war), this court had no jurisdiction of the case.

12 Stat., 820, c. 120, § 3; Hayeroft *v.* U. S., 22 Wall., 92 to 98.

Elgee's administrator *v.* Lovell, 1 Woodworth, C. C. Rep., 102, per Miller, J., 117–18.

McLeod *v.* Callicott, C. C., 2 American Law Times Reps., 111, per Chase, Ch. J.

Webster's Dictionary, titles, "seizure," "capture."

Burrill's Law Dictionary, title, "capture."

EDWIN B. SMITH,
Assistant Attorney General.

Vide

12 Stat 820

Civ. Litt. Act Feby 1872 Vide

13 Stat 375

2 Wall 420 Mrs Ad & Alton

92 US 494 Lamar vs Brown

96 US 30. US vs Stark & K

20 Wall 81. Hay Co & Ch

22 " 185 Clyde Civil

12 Statutes 767. Lem & Ch

Jan 1493
Oct 7 1878

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

CLARK & FULTON
vs.
THE UNITED STATES. } No. 111.

SUPPLEMENTAL BRIEF FOR APPELLEES.

Appellants' supplemental brief renews and for the most part repeats a discussion, already sufficiently extended, of objections to the defendants' third plea (fol. 7). Two points substantially are presented:

First. It is contended that although the claimants cannot take benefit of any of the exceptions for disability enumerated in the second proviso of section ten, act March 3, 1863 (12 Stat., 765), and although the proviso further declares "but no other disability than those enumerated shall prevent any claim from being barred nor shall any of said disabilities operate cumulatively," yet the law is that the time during which the courts of a country are closed to an enemy shall not be reckoned in determining whether his right of action is barred by statutory limitation after the courts are opened to him by peace, and that they can rely on this principle

as effective, the positive declaration above quoted notwithstanding.

Without disputing the correctness of the doctrine in cases to which it may be properly applied, its application here seems unwarranted for several reasons:

1. The difference between this and an ordinary statute of limitations is overlooked. In Haycraft's case (22 Wall., 92) this court held a similar provision to be jurisdictional, and not in the nature of a statute of limitation. The reasoning which enforces that conclusion is of equal application here, and in Kendall's case the Court of Claims has recently so decided in a clear and able opinion of the chief justice, which is appended. Even if Congress alone has the right to prescribe the conditions on which suits against the sovereign may be brought, and those conditions are not subject to be enlarged or modified by judicial discretion, this provision could be regarded as a statute of limitation only.

2. It follows that since Congress has expressly directed the court not to permit any extension of the six years' bar by reason of disability except in the enumerated case, the courts cannot and will not interpolate other exceptions.

3. The doctrine in question has no just application to a case like this. It is contrary to good morals and the supreme law of public safety to admit that a citizen may willfully cast off his allegiance and engage in rebellion against the State and still be entitled to claim the benefit of a disability created by his own crime. The Court of Claims has been open to these claimants at all times, and there has been no time since the capture of New Orleans and Mobile, at least, that it has not been in their power, so far as appears, to bring suit in that court by

taking the proper steps to resume their allegiance and obtain restoration of their civil rights. If, as is claimed, the mere fact of residence in either place made them in a legal sense enemies until the close of the war, it still appears that they preferred to remain in that category, and they cannot complain of the legal consequence which it was in their power to avoid.

Second. It is further contended by claimants that their claim did not accrue until ratification by defendants of the alleged illegal act of the Treasury agent, and they refer to the act of July 27, 1868 (15 W., 243), as a legislative ratification thereof, and set up that date as the point of time when their claim *first accrued*.

If, as defendants have contended, the act of the agent, or rather of the Secretary of the Treasury, in appropriating the cotton and depositing the proceeds in the Treasury was authorized by law, it follows from the reasons formerly assigned that this action will not lie.

But assuming the act to have been unlawful, and that, as claimant argues, Congress only could ratify the act so as to give a right of action against the defendants, does this act of July 27, 1868, have the effect ascribed to it?

In Green's case (11 C. C., 473) the Court of Claims held that no action would lie by public law against a State after peace by a former enemy for injuries inflicted in time of war by any agent or citizen of that State, and that there could be no judicial remedy in such case against the State in its courts other than such as the State itself should prescribe; and that the act of March 12, 1863, was the only act which provided a remedy and prescribed the conditions under which the defendants might be sued for acts done by or under color of their authority in the late war.

This seems decisive of the present case; but claimants profess to find in the act July 27, 1868, some further remedy, and treat it as creating a new and additional jurisdiction in the court below to entertain, for six years from its date, suits such as theirs.

The reason for the passage of that act, and its meaning, are apparent by inspection of its provisions. Defendants, officers and agents, in executing the act of March 12, 1863, were harassed with suits in replevin and trespass brought in the State courts by those who, as disloyal, could then have no standing in the Court of Claims, or who sought to evade the jurisdiction of that court on the ground that the property, though taken under color of the act relating to captured and abandoned property, was not in fact within either category. The act in question was intended to enforce the remedy provided by that act in the Court of Claims as the only remedy available in any such case, and that court has evidently always so interpreted it, for there is no record of the court having ever entertained the proposition that their jurisdiction, where proceeds of cotton taken by a Treasury agent were shown to be in the Treasury, depended on whether the property was proven to be in fact captured or abandoned when taken. It was enough that the officer taking or receiving it acted under color of the authority given by that act. If there were any doubt on this point prior to July 27, 1868, there was none thereafter.

The act did not therefore create a new jurisdiction, but affirmed and defined that which already existed. It notified all concerned of the only conditions under which the defendants would be sued, and gave them time enough to resort to the proper forum, for the limitation

prescribed by the act March 12, 1863, did not expire until August 20, 1868. If claimants did not bring suit before that date because they were disloyal or because they misconstrued the effect of either the act of March, 12, 1863, or of the act of July 27, 1868, the fault is their own. Any possible hardship that might arise was remedied, moreover, by the liberality of Congress in the subsequent provision for payment of such claims at the Treasury by § 5, act May 18, 1872 (17 St., 134).

The fallacy of the claimants' position is in their misconception or perversion of what the act of 1868 does. It does not say in substance, as they claim, that Congress ratifies all unlawful acts of the public agents and accepts liability of the State therefor, and provides a remedy by suit under the general jurisdiction of the Court of Claims as on an implied contract of the State with its late enemies, giving them an additional term of six years within which to sue, even though in many cases all remedy against the agent personally may have already been barred by ordinary limitation.

The third section of the act which is relied on by claimants declares explicitly that the remedy provided by the act March 12, 1863, which was by suit brought in the Court of Claims within two years after the close of the rebellion, was intended to be exclusive of every other remedy in any other court for any seizure made "in virtue or under color of said act," and from July 27, 1868, at least, no suit for such a seizure could be otherwise brought than under the conditions prescribed by the act referred to; and no authority is given to bring suits for seizures not alleged to be in virtue or under color of said act under those or any other conditions. Until the claimants, therefore, can produce an act of

Congress which permits them to sue the defendants upon the precise conditions involved here, they fail to make out their case. It seems plain that the act relied on does not.

It will be observed that the positions taken by the plaintiffs in their supplemental brief are at variance with those taken in the original briefs. Thus it is said on page 5 of the brief of M. H. Carpenter, esq., that the case does not fall within the statutes of July 2, 1874, and July 27, 1868, and that these statutes apply only to property captured or abandoned; and that, therefore, "these statutes have nothing to do with the matter in hand." So it is said the case of the plaintiffs is rested upon the ground that the cause of action accrued against the government by the payment of the avails of the cotton into the Treasury in the autumn of 1865. (Brief of John J. Weed, esq., p. 45, 51.)

It is not necessary here to repeat the answers made to the ground as originally taken by the plaintiffs for maintaining the suit.

CHAS. DEVENS,
Attorney-General.
T. S. SIMONS,
Assistant Attorney-General.

APPENDIX.

COURT OF CLAIMS.

PETER F. KENDALL
vs.
THE UNITED STATES. } No. 6830.

ON MOTION.

DRAKE, Ch. J., delivered the opinion of the court:

The fifth rule of this court, as heretofore existing, required that a plea of limitation should be filed within sixty days after the filing of the petition.

In this case the petition was filed November 22, 1872, and the plea of limitation August 24, 1874.

The claimant moves to strike the plea from the files, because it was not filed within the time prescribed by the rule.

The motion must be overruled, but on grounds entirely disconnected with the rule.

When the petition was filed, it was provided by section 10 of the act of March 3, 1863 (12 Stat. L., 765), "that every claim against the United States, cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court, or transmitted to it under the provisions of this act, within six years after the claim first accrues: *Provided*, * * * That the claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and

persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court, or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively."

This provision is embodied in section 1069 of the Revised Statutes.

The consideration of the pending motion has brought before us the question whether, under that provision, it is necessary for the government to plead the bar there prescribed, in order to avail itself of it; and we are all of the opinion that is not.

There is a great difference between the terms of this act and those of any other statute of limitations that we have found.

We are not aware of any such statute that declares a *demand debarred* if not sued on within the prescribed time; but the prescription always applies solely to the right of action thereon.

The plea of the statute in a suit between individuals is a personal privilege, of which the defendant may or may not avail himself, as he pleases. If he does not interpose it, he is deemed to waive it; and no court will set it up for him, no matter how plainly it appears on the face of the declaration or petition that the action is barred; for it is his duty to inform the court that he demands the protection of the statute; and to give notice thereof, also, to the plaintiff, who might be within some of the exceptions mentioned in the statute, and should have opportunity to set up that fact in replication.

But the parties to a suit in this court have a very different relation to each other from that of individuals in other courts. This court is established to enable claimants to prosecute claims against the United States, which they could not do except by the permission of the government, given by law. And when they come here in pursuance of that permission, they come subject, of course, to all the statutory terms prescribed by the law-making department of the government, and there is no power in this court to admit them here as suitors on any other terms, nor to go beyond the line of jurisdiction laid down for it by the law, nor to remove or disregard any barrier which the legislature has erected, nor to interpose any that that body has not prescribed. And the legislative voice must be held to be always speaking through the laws, without dependence upon any government officer's action in any suit; and it is the duty of this court always to know what that voice is, and to obey and enforce it, whether invoked thereto by any such officer or not.

When, therefore, the law declares that "a *claim* shall be forever *barred* unless the petition setting forth a statement of the claim be filed in the court within six years after the claim first accrues," it is in effect a standing and ever-present plea of limitation, which the court is bound to take cognizance of in every case, without regard to whether the law officer of the government in charge of cases here has or has not filed a written plea setting up the limitation, and to give it practical effect by inquiring, *ex mero motu*, whether on the face of the petition or by the evidence it appears that the period limited by the law had expired before the petition was filed, and, where it had expired, to dismiss the suit, un-

less the claimant avers and proves the existence of some legally-recognized disability which prevented his resort to this court within the prescribed time.

If the petition in any case shows on its face that the claim first accrued more than six years before the petition was filed, it is a fatal obstacle to any relief here, unless the petition go on to set forth a disability.

If, as in the present case, the petition do not show when the claim first accrued, the court must wait till the evidence discloses the fact, and then act.

It follows from these views that the defendants were entitled to set up in defense the limitation; and as they chose to file a plea to that effect, the plea is entitled to remain on file.

The motion to strike it out is therefore overruled.